ARGUMENT

I. This Court Should Subject the Standing Bail Order to Heightened Scrutiny Because it Violates Indigent Detainees' Equal Protection and Due Process Rights Under the Fourteenth Amendment.

A. The Prohibition on Wealth-Based Detention Should be Extended to Include Pretrial Detention.

The City of Calhoun has instituted a policy that detains indigent arrestees longer than it detains affluent ones. Whether by design or by defect, this policy cannot pass constitutional muster absent adequate justification. This case falls within the shadow of *Williams v. Illinois*, 339 U.S. 235 (1970), *Tate v. Short*, 401 U.S. 395 (1971), and *Bearden v. Georgia*, 461 U.S. 660 (1983), three cases in which this Court applied heightened scrutiny to policies that resulted in the discriminatory detention of indigents. Not only does Calhoun's SBO bring about the same consequences as the policies in *Williams*, *Tate*, and *Bearden*, but it also implicates the same intersection of equal protection and due process rights that the trilogy sought to protect. It should be subjected to the same level of scrutiny.

In *Williams*, this Court explicitly held that wealth-based detention violated the Equal Protection Clause. 339 U.S. at 240-41. There, the petitioner challenged a policy requiring incarcerated individuals to remain in detention while they "work off" any outstanding monetary obligations at the conclusion of their sentence. *Id.* at 236-37. Chief Justice Burger, writing for the majority, explained that the defect in the policy was its asymmetrical effect on individuals of different means. *Id.* at 242. This Court recognized that the state had a valid interest in collecting the fines still owed by the incarcerated individuals, but nonetheless struck down the policy because of the availability of other, less discriminatory means to pursue that interest. *Id.* at 244.

This Court extended *Williams* a year later in *Tate*, wherein it considered whether an indigent individual who was unable to pay fines stemming from traffic violations could be

committed to a municipal prison farm to work off his debt. 401 U.S. at 396-97. A unanimous Court concluded that the policy was unconstitutional because it subjected the petitioner and others similarly situated to "imprisonment solely because of [their] indigency." *Id.* at 398. Just as it did in *Williams*, this Court applied heightened scrutiny in all but name, rejecting the policy because there were "other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." *Id.* at 399.

In *Bearden*, this Court further extended both *Williams* and *Tate* by unanimously rejecting a policy that allowed revocation of probation due to indigency without an inquiry into why a probationer had failed to pay. 461 U.S. at 672-73. While this Court noted that "[m]ost decisions in this area have rested on an equal protection framework," *id.* at 665, it diverged from that trend by rooting its decision in the "fundamental fairness" inquiry at the core of due process analysis. *Id.* at 673 (explaining that the policy at issue was "contrary to the fundamental fairness required by the Fourteenth Amendment."). This flexibility resulted from the fact that *Williams*, *Tate*, and *Bearden* were all cases in which "[d]ue process and equal protection principles converge." *Id.* at 665. This Court ultimately held that individuals who had the means to pay their fine could be imprisoned for their willful behavior, but it would be "fundamentally unfair" to imprison a probationer "who has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own." *Id.* at 668-69. Though this Court arrived at its holding via a different constitutional path, the outcome was the same and the discriminatory policy was overturned. *Id.* at 672-73.

Each case in the *Williams-Tate-Bearden* trilogy shares a common narrative with the SBO: A locality pursuing its legitimate interest in maintaining the integrity of its legal system implements a policy that detains the poor while the wealthy go free. Regardless of whether that

detention was an extension of an existing sentence, as in *Williams*, an alternative to a traffic fine, as in *Tate*, or the result of revoked probation, as in *Bearden*, this Court recognized the gravity of the personal freedom at stake and demanded sufficient justification from the state. Now, this Court must decide if pretrial detention is worthy of that same scrutiny.

Extending the holding from *Williams*, *Tate*, and *Bearden* to include pretrial detention is both reasonable and logical, and it is by no means unprecedented. Pretrial detainees' interest in avoiding unwarranted detention is arguably even stronger because they have not yet been convicted of anything and are presumed innocent. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 Yale L. J. F. 1098, 1118 (2019) ("If heightened scrutiny . . . protect[s] convicted indigent defendants, [it] surely ought to apply in the pretrial context, where the presumption of innocence and a defendant's ability to prepare for trial are most vulnerable."). The former Fifth Circuit, sitting *en banc*, reached this exact conclusion in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978), explaining that "such deprivation of liberty of one who is accused but not convicted of crime . . . present[s] a question having broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents." 572 F.2d at 1056; *accord In re Humphrey*, 482 P.3d 1008, 1018-19 (Cal. 2021). This Court should ensure that pretrial detainees are afforded the same protection extended to individuals who have already been convicted and sentenced.

B. The Convergence of Due Process and Equal Protection Principles Justifies Heightened Scrutiny.

[omitted]

C. Heightened Scrutiny is Warranted Because the Standing Bail Order Violates the Equal Protection Clause.

Even if this Court should choose to evaluate Walker's equal protection and due process claims separately, heightened scrutiny is still warranted. In the context of the Equal Protection Clause, this Court's holding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), requires that the SBO be examined with heightened scrutiny.

Rodriguez established a clear test to determine whether wealth-based discrimination warrants heightened scrutiny under the Equal Protection Clause. While the case notably held that indigence is not a suspect classification—a principle that Walker does not challenge—it also explicitly exempted several prior cases from that general rule. *Id.* at 20-22. Among those exempted cases were *Williams* and *Tate*. *Id.* at 21-22. In explaining this carveout, this Court noted that "[t]he individuals . . . in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* at 20. Put simply, *Rodriguez* requires heightened scrutiny when two conditions are met: (1) the policy in question discriminates against the indigent on the basis of wealth, and (2) that discrimination results in the absolute deprivation of a benefit. *Id.* at 20-21; *Walker II*, 901 F.3d at 1273 (Martin, J., concurring in part and dissenting in part).

The Fifth Circuit utilized this carveout in *ODonnell v. Harris County,* wherein it applied heightened scrutiny to a bail policy that disproportionately detained indigent arrestees because of their inability to pay. 892 F.3d 147 (5th Cir. 2018), *overruled on other grounds by Daves v. Dallas County*, 22 F.4th 522 (5th Cir. 2022). Harris County's bail schedule operated in a similar fashion to the SBO, dictating a bail amount that corresponded to the severity of the alleged offense. *Id.* at 153. However, it was only ever meant to serve as an optional guideline for

officials to use in making bail determination. *Id.* (observing that officials were "legally proscribed from mechanically applying the bail schedule to a given arrestee."). Instead, state law mandated "an individualized review" that would consider "the defendant's ability to pay," along with several other factors. *Id.* at 153. These procedural safeguards did not work. The district court found that arrestees "routinely must wait days for their hearings," and when they finally occurred the bail schedule was followed "90 percent of the time." *Id.* at 154. The resulting scheme "specifically target[ed] poor arrestees," *Id.* at 154, and "resulted in detainment solely due to a person's indigency." *Id.* at 161. Applying the *Rodriguez* test, the Fifth Circuit affirmed the lower court's application of heightened—in that case intermediate—scrutiny, holding that the policy caused indigent arrestees to "sustain an absolute deprivation of their most basic liberty interests—*freedom from incarceration*." *Id.* at 162 (emphasis added).

By contrast, the Eleventh Circuit examined a virtually identical policy and reached the opposite conclusion. The panel's application of the *Rodriguez* test is aptly summarized by its observation that "Walker and other indigents suffer no 'absolute deprivation' of the benefit they seek, namely pretrial release" and instead need only "wait some appropriate amount of time to receive the same benefit as the more affluent." *Walker II*, 901 F. 3d at 1261. This conclusion highlights two critical flaws in the panel's reasoning: (1) the court defined the benefit at issue as "pretrial release" instead of "freedom from incarceration," and (2) the court mistakenly concluded that the Equal Protection Clause tolerates any amount of discriminatory detention. These errors help explain how the Eleventh Circuit incorrectly concluded that Calhoun's SBO fell outside the scope of *Rodriguez*.

1. The Standing Bail Order Jeopardizes Indigent Detainees' Right to Freedom from Incarceration.

Viewed in the context of this Court's prior holdings, the benefit the SBO places in jeopardy is more accurately defined as "freedom from incarceration," rather than the narrow benefit of "pretrial release." We need only export this linguistic sleight-of-hand to another case to see that adopting an unnecessarily narrow view of the benefit at issue is misguided. Just as it would be ludicrous to read *Williams* as protecting a hypothetical "benefit of release at the conclusion of a prison sentence," or *Bearden* as safeguarding the "benefit of not having one's parole revoked for reasons beyond their control," so too is it improper to read this case as addressing the benefit of early release from pretrial detention. While none of these controlling opinions explicitly identified the benefit at stake, the Fifth Circuit did so in *ODonnell*. 892 F.3d at 162 (identifying each of these cases as efforts to protect the "freedom from incarceration."); *see also Williams,* 399 U.S. at 263 (Harlan, J., concurring) ("this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free."). That pronouncement, combined with this Court's detailed history of safeguarding the right to freedom from incarceration, indicate that the Eleventh Circuit's reframing of the right at issue was improper.

The distinction between "pretrial release" and "freedom from incarceration" may seem inconsequential, but how a court defines a perceived benefit dramatically changes how that benefit fits within the *Rodriguez* framework. The narrow benefit of "pretrial release" delineates a temporal range that begins when a person is detained and ends when their trial begins. If a detainee is released at any point in that wide range of time, they can be said to benefit from pretrial release. Owing to this flexibility, it is easy to diminish this benefit without denying it outright. In fact, a detainee's ability to enjoy this benefit diminishes with each passing moment

they are in jail, but they are only absolutely deprived of the benefit if they are still detained at the time their trial begins. Until that proceeding commences, it is still possible for the detainee to be released, so their deprivation cannot be absolute. In the context of the *Rodriguez* test, narrowly defining the benefit so as to make it easy to diminish but virtually impossible to absolutely eliminate drastically reduces the likelihood that heightened scrutiny will be necessary.

In contrast, "freedom from incarceration" identifies a binary state: in any given moment, a person is either incarcerated or they are not. Unlike pretrial release, which diminishes throughout the time that a person is incarcerated before their trial, freedom from incarceration cannot be eroded away. Rather, because it is a simple yes-or-no question, a person is either absolutely deprived of the benefit or they are not deprived of it at all. Try as it might, the state cannot diminish this benefit; by placing a person in detention, the state can only take it outright. This interpretation does not guarantee that a detention policy will be rejected. However, it does safeguard the integrity of the *Rodriguez* test by ensuring a more exacting standard of review when, as here, a detention regime discriminates on the basis of wealth.

In light of this important distinction, the decision to reject freedom from incarceration and embrace pretrial release within the context of the *Rodriguez* test is more than mere "word play." *Walker II*, 901 F.3d at 1274 (Martin, J., concurring in part and dissenting in part). By framing the benefit as it did, the Eleventh Circuit began its application of the *Rodriguez* test with the outcome all but assured. *Rodriguez* demands absolute deprivation before heightened scrutiny is justified, but if the benefit at issue can only be absolutely deprived at the commencement of trial, a wide range of discriminatory policies—including the SBO at issue here—will fail the test. However, properly framed as a yes-or-no question, Calhoun's SBO unequivocally deprives indigent arrestees of the benefit of freedom from incarceration as soon as they are detained.

2. Any Unwarranted Detention Results in an Absolute Deprivation of the Right to Freedom from Incarceration.

Separate from this impermissible reframing, the conclusion that the 48 hour timeframe established by the SBO was not an "absolute deprivation" under *Rodriguez* because it was an "appropriate amount of time" is irreconcilable with this Court's precedent. To the contrary, *Williams* and its progeny strongly imply that if detention is the result of discrimination, no amount is constitutionally permissible, let alone appropriate.

The *Williams-Tate-Bearden* trilogy afforded this Court ample opportunity to consider whether there was some amount of wealth-based detention that the Equal Protection Clause could tolerate. Instead, it firmly denounced any detention that exceeded the relevant statutory limits. In *Williams*, Chief Justice Burger offered an unqualified denunciation of the detention period imposed by the state's policy, stating only that the "imprisonment exceeds the maximum period fixed by the statute." 339 U.S. at 240. This Court's opinions in *Tate* and *Bearden* provide similarly unequivocal language. *Tate*, 401 U.S. at 399 ("[the state's detention policy] *cannot* . . . limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant.") (emphasis added); *Bearden*, 461 U.S. at 667-68 ("[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it *may not* thereafter imprison a person solely because he lacked the resources to pay it.") (emphasis added). The Fifth Circuit operated well within these boundaries in deciding *ODonnell*, wasting no time analyzing the length of pretrial detention for indicia of appropriateness even though many indigent detainees remained in jail for *more* than 48 hours under Harris County's bail policy. 892 F.3d at 154. This Court's prior holdings strongly support the conclusion that wealth-based detention is wholly inappropriate, and it deprives indigent detainees of their freedom from incarceration the moment that detention begins.

3. The Pretrial Detention Authorized by the Standing Bail Order Fits Within the *Rodriguez* Carveout.

Heightened scrutiny is warranted because the SBO satisfies both parts of the *Rodriguez* test. That the policy applies only to the indigent is plain to see: wealthy arrestees are afforded immediate release while the poor are detained for up to 48 hours.[1] Ultimately, the outcome of the test turns on how the benefit at issue is construed. Framing the benefit as "pretrial release" all but precludes a finding of heightened scrutiny. However, such a framing makes little sense in the context of this Court's other equal protection holdings and threatens the integrity of the *Rodriguez* test.

Therefore, this Court should find that the right at issue is "freedom from incarceration" for the purposes of applying the *Rodriguez* test. Within this framing, the SBO clearly results in the absolute deprivation of indigent arrestees' freedom from incarceration because it authorizes a detention period of up to 48 hours while the Equal Protection Clause authorizes none. As such, *Rodriguez* mandates that the SBO be reviewed with heightened scrutiny.

D. Heightened Scrutiny is Warranted Because the Standing Bail Order Violates the Due Process Clause of the Fourteenth Amendment.

[omitted]

[1] Judge Martin, dissenting in relevant part, offers an illustrative example of the discriminatory effect of the SBO: "Consider two people, one who has money and the other who does not. They are arrested for the same crime at the same time under the same circumstances. Under the Standing Bail Order, these two would have the identical bail amount, as established by the master bail schedule. The person who has money pays it and walks away. The indigent can't pay, so he goes to jail. This is plainly 'imprisonment solely because of indigent status.'" *Walker II*, 901 F.3d at 1273-74 (Martin, J., concurring in part and dissenting in part) (quoting *Pugh v. Rainwater*, 572 F.2d 1053,1056 (5th Cir. 1978)).

Applicant Details

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Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal on Poverty Law and Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Monroe E. Price Media Law International Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CASEY KOVARIK

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June 10, 2021

The Honorable Elizabeth W. Hanes
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Magistrate Judge Elizabeth W. Hanes,

I am writing to apply to clerk in your chambers for the Aug 15, 2022 - Aug 15, 2024 term. I am a rising third-year law student at Georgetown University Law Center where I am a member of the moot court team and an editor for the *Georgetown Journal on Poverty Law and Policy*. I hope to work in white collar and antitrust litigation; combining my economics and accounting background with the law has been interesting and rewarding in internships and classes during law school.

Before law school, in May of 2019, I set off on a bike ride across the country with eighteen teammates as part of an organization called Bike & Build. The organization's mission is to increase awareness of the need for affordable housing, support local affordable housing nonprofits, and inspire young people to dedicate themselves to a lifetime of service. As we biked, we were hosted by the communities we passed through, often sleeping in churches and community centers. We were constantly moving and often did not have cellular service, let alone an internet connection which meant that we had to have multiple back up plans and skills to make it through tough stretches of road. The cross-country ride changed the way I approach communication and problem solving. I learned to mediate and compromise in a large and diverse group of minds and to be self-reliant in problem solving. I use these skills in professional and schoolwork every day.

Enclosed please find my resume, transcript, writing sample, and letters of recommendation. Thank you for your consideration.

Sincerely,

Casey Kovarik

CASEY KOVARIK

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EDUCATION

Georgetown University Law Center — **Washington, DC**
Juris Doctor — Expected May 2022
GPA: 3.69 (Dean's List Fall 2020, Spring 2021)
Online Editor: *Georgetown Journal on Poverty Law and Policy*
Moot Court: Member, Appellate Advocacy Team (semi-finalist of Georgetown competition, semi-finalist Americas Round Price International Media Moot Court Competition)
Activities: President, Women's Legal Alliance; Tutor, Georgetown 1L Tutoring Program
Practicum: Street Law Student Teacher (introductory legal course for DCPS high school students)

University of California – Los Angeles — **Los Angeles, CA**
Bachelor of Arts, Majors: Political Science & Economics — June 2017
GPA: 3.55
Honors: Columnist, top U.S. collegiate paper; Collegiate National Champion Women's Triathlon (Team)
Thesis: "Electoral Influence on District Attorney Felony Charging Behavior"

EXPERIENCE

Georgetown Criminal Justice Clinic — **Washington, DC**
Student Attorney — August 2021 – May 2022
- Represent clients charge with misdemeanors in D.C. Superior Court

O'Melveny & Meyers LLP — **Los Angeles, CA**
Summer Associate — May 2021 – July 2021
- Researched novel defense theories in complex white collar litigation
- Drafted memo in preparation for motion to dismiss securities fraud case based on impermissible extraterritorial application of U.S. securities law

U.S. Securities and Exchange Commission — **Washington, DC**
Division of Enforcement Intern — January 2021 – April 2021
- Researched novel disgorgement issues and wrote memo for supervisor and team
- Investigated conversion and trading activity of potential defendant for improper practices

Law Offices of Los Angeles County Public Defender — **Los Angeles, CA**
Law Clerk — June 2020 – August 2020
- Drafted motion to suppress evidence and supplemental brief on relevant case law
- Reviewed eyewitness interviews for inconsistencies as part of murder case
- Found psychiatric expert witness to testify re: fitness for mental health diversion treatment; submitted request to court and updated client on mental health evaluation

TM Financial Forensics, LLC — **Los Angeles, CA**
Associate — August 2017 – March 2019
- Analyzed economic viability of claims (breach of contract, patent infringement, fraud, environmental)
- Created economic models forecasting future client performance
- Designed graphs to illustrate data, models, and forecasts
- Prepared expert witness for depositions and cross examination

American Civil Liberties Union, Southern California — **Los Angeles, CA**
Jails Project Intern — January 2017 – May 2017
- Processed and monitored neglected inmate complaints
- Compiled data on compliance with health and safety regulations, as court-ordered monitor of local jails

Record of: Casey Nicole Kovarik
GUID: 827210611

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	B+	19.98	
LAWJ	005	32	Legal Practice: Writing and Analysis Sonya Bonneau	2.00	IP	0.00	
LAWJ	007	93	Property in Time Sherally Munshi	4.00	A-	14.68	
LAWJ	009	32	Legal Justice Seminar Louis Seidman	3.00	B	9.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	43.66	3.36
Cumulative	13.00	13.00	43.66	3.36

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	P	0.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	P	0.00	
LAWJ	005	32	Legal Practice: Writing and Analysis Sonya Bonneau	4.00	P	0.00	
LAWJ	008	32	Government Processes Howard Shelanski	4.00	P	0.00	
LAWJ	611	20	Advocacy, Client Counseling and Negotiation Skills in Practice Settings Sheldon Krantz	1.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	18.00	0.00	0.00	0.00
Annual	29.00	13.00	43.66	3.36
Cumulative	31.00	13.00	43.66	3.36

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	038	05	Antitrust Economics and Law Steven Salop	4.00	A	16.00	
LAWJ	1085	05	Sentencing Law and Policy Mark MacDougall	2.00	A-	7.34	
LAWJ	1397	05	Street Law: Criminal Justice and Human Rights (PROJECT-BASED PRACTICUM) Charisma Howell	5.00	A-	18.35	
LAWJ	165	01	Evidence Tanina Rostain	4.00	A	16.00	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	57.69	3.85
Cumulative	46.00	28.00	101.35	3.62

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1491	05	Externship I Seminar (J.D. Externship Program) John Thorlin		NG		
LAWJ	1491	80	~Seminar John Thorlin	1.00	A	4.00	
LAWJ	1491	82	~Fieldwork 3cr John Thorlin	3.00	P	0.00	
LAWJ	1705	08	Law and Economic Analysis of the Public Sector Seminar Brian Galle	3.00	A	12.00	
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties Girardeau Spann	4.00	P	0.00	
LAWJ	361	05	Professional Responsibility Stuart Teicher	2.00	A	8.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	6.00	24.00	4.00
Annual	28.00	21.00	81.69	3.89
Cumulative	59.00	34.00	125.35	3.69

End of Juris Doctor Record

University of California, Los Angeles
UNDERGRADUATE Student Copy Transcript Report

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This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: KOVARIK, CASEY N
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Generation Date: June 13, 2021 | 12:33:53 PM
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Program of Study

Admit Date: 09/23/2013
COLLEGE OF LETTERS AND SCIENCE

Majors:
ECONOMICS
POLITICAL SCIENCE

Degrees | Certificates Awarded

BACHELOR OF ARTS Awarded June 16, 2017
in ECONOMICS
in POLITICAL SCIENCE

Secondary School

ISSAQUAH HIGH SCHOOL, June 2013

University Requirements

Entry Level Writing	satisfied
American History & Institutions	satisfied

California Residence Status

Nonresident

Transfer Credit

Institution		Psd
ADVANCED PLACEMENT	1 Term to 10/2013	32.0

Fall Quarter 2013

Major:
PREPOLITICAL SCIENCE

HUMAN EVOLUTION	ANTHRO 7	5.0	18.5	A-
AMERICAN NOVEL	ENGL 85	5.0	16.5	B+
INTEGRTN&INF SERIES	MATH 31B	4.0	12.0	B

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	47.0	3.357

Winter Quarter 2014

PRIN OF ECONOMICS	ECON 1	4.0	13.2	B+
CALC OF SEVRL VAR	MATH 32A	4.0	12.0	B
PHYSICS	PHYSICS 10	4.0	13.2	B+
INTRO-AMERICN PLTCS	POL SCI 40	5.0	18.5	A-

	Atm	Psd	Pts	GPA
Term Total	17.0	17.0	56.9	3.347

Spring Quarter 2014

PRIN OF ECONOMICS 07/11/2014 Grade Changed	ECON 2	4.0	12.0	B
CALC OF SEVRL VAR	MATH 32B	4.0	0.0	P
WORLD POLITICS	POL SCI 20	5.0	20.0	A

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	32.0	3.556

Fall Quarter 2014

CLIMATE CHANGE	A&O SCI 1	4.0	16.0	A
CLIMATE CHANGE LAB	A&O SCI 1L	1.0	4.0	A
MICROECONOMC THEORY	ECON 11	4.0	14.8	A-
INTRO-COMPRTV PLTCS	POL SCI 50	5.0	18.5	A-

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	53.3	3.807

Winter Quarter 2015

MICROECONOMC THEORY	ECON 101	4.0	9.2	C+
REGNL DEV&WRLD ECON	GEOG 4	5.0	18.5	A-
INTRO-STAT REASON	STATS 10	5.0	16.5	B+

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	44.2	3.157

Spring Quarter 2015

STATS-ECONOMISTS	ECON 41	4.0	10.8	B-
CRITCL READ&WRITING Writing Intensive	ENGL 4W	5.0	20.0	A
POLITICS & STRATEGY	POL SCI 30	5.0	20.0	A

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	50.8	3.629

Transfer Credit

Institution		Psd
LONDON SCH ECON/POLI	1 Term to 07/2015	11.0

Fall Quarter 2015

Major:
ECONOMICS

INTRO-ECONOMETRICS	ECON 103	4.0	13.2	B+
ECONOMETRICS LAB	ECON 103L	1.0	3.3	B+
ISLAM AND POLITICS	POL SCI 165	4.0	12.0	B
CHINESE RELIGIONS	RELIGN M60B	5.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	28.5	3.167

Winter Quarter 2016

Majors:
ECONOMICS
(New) POLITICAL SCIENCE

MACRO ECON THEORY	ECON 102	4.0	8.0	C
ENVIRONMENTAL ECON	ECON M134	4.0	10.8	B-
ACCOUNTING PRINCPLS	MGMT 1A	4.0	0.0	NP
RIGHTS OF ACCUSED	POL SCI 145E	4.0	14.8	A-

	Atm	Psd	Pts	GPA
Term Total	16.0	12.0	33.6	2.800

Spring Quarter 2016

ART&SCIENCE&TCHNLGY	DESMA 9	5.0	20.0	A
HIST OF ECON THEORY	ECON 107	4.0	0.0	C-
Repeated: Excluded from GPA 11/30/2016 Grade Changed				
INTERNTL TRADE THRY	ECON 121	4.0	13.2	B+
ELEMENTARY SPANISH	SPAN 2	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	13.0	17.0	49.2	3.785

Fall Quarter 2016

ELECTN&MEDIA&STRTGY	POL SCI 141E	4.0	14.8	A-
CAPPP WASHINGTN SEM	POL SCI M191DC	8.0	32.0	A
WASHDC INTERNSHIP	POL SCI M195DC	4.0	0.0	P

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	46.8	3.900

Winter Quarter 2017

THEORS-GROWTH&DEVEL	ECON 111	4.0	14.8	A-
BEHAVIORAL ECON	ECON 148	4.0	13.2	B+
GLOBALIZTN&MDL EAST	POL SCI 139	4.0	16.0	A
ELEMENTARY SPANISH	SPAN 3	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	60.0	3.750

Spring Quarter 2017

HIST OF ECON THEORY	ECON 107	4.0	14.8	A-
Repeat of Course Previously Taken				
LABOR ECONOMICS	ECON 150	4.0	16.0	A
DIVERSITY&DEMOCRACY	POL SCI 115D	4.0	16.0	A+
06/27/2017 Grade Changed				
CIVIL LIBERTIES	POL SCI 145C	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	12.0	62.8	3.925

UNDERGRADUATE Totals

	Atm	Psd	Pts	GPA
Pass/No Pass Total	17.0	13.0	N/a	N/a
Graded Total	160.0	160.0	N/a	N/a
Cumulative Total	177.0	173.0	565.1	3.532

Total Non-UC Transfer Credit Accepted	43.0
Total Completed Units	216.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

GEORGETOWN LAW

Charisma Howell
Visiting Associate Professor of Law and Director
Georgetown Street Law

May 1, 2021

To Whom It May Concern:

It is my pleasure to recommend Ms. Casey Kovarik for a judicial clerkship. In the fall 2020 semester, Ms. Kovarik was a student in the Street Law High Schools practicum, which I direct at Georgetown University Law Center.

Ms. Kovarik is a bright, enthusiastic, and highly capable law student. In my practicum course, she taught one semester-long class in a D.C. public high school. The course has twin goals: introducing the law students to skills needed for effective lawyering and using legal concepts to actively engage the high school students in intellectual, expressive, and civic skills. I believe Ms. Kovarik's participation in Street Law has given her a substantial foundation in the subject matter areas she will be involved in and skills she will find instrumental in her work as a judicial law clerk. She has become a master of advocacy skills, which she imparted to her high school classes. Ms. Kovarik was highly substantive and organized in her practicum performance. She demonstrated continuous effort at improving her teaching. She prepared well-researched and creative lessons that conveyed both the substance and policy issues surrounding various legal subjects, including criminal law and procedure, trial practice, and human rights law.

Ms. Kovarik had a challenging high school placement, Coolidge High School, a Title 1 school that has struggled with low reading and math test scores and has a student body where 100% of the students qualify for free or reduced-price lunch. To be effective in her classroom, Ms. Kovarik needed to elevate her understanding of the law and legal concepts to convey the information to her students effectively. Ms. Kovarik's students had a wide range of ability and interest levels that she needed to address in a purely virtual setting. She faced countless difficulties associated with

online learning and resulting student disengagement.

Even in the face of these challenges, Ms. Kovarik managed to combine various teaching methods, including class discussions and rigorous small group activities, to create a learning environment that worked for everyone in her class. She mastered time management by planning her lessons and carrying them out often in class periods as short as 50 minutes. Ms. Kovarik successfully pushed her students to articulate better and more creative comments in the classroom and written assignments, providing guidance and feedback on their work. Students who were ambivalent about their Street Law class became enthusiastic and outspoken. Ms. Kovarik strove to create a class environment that encouraged the expression of opinions. Students often helped each other to think through their legal reasoning and develop better defended arguments. In these ways, Ms. Kovarik sought to make her classroom a model of due process of law.

Although Street Law does not involve law students in direct representation or litigation, I believe the practicum does prepare law students to be outstanding advocates. Ms. Kovarik engaged in serious legal research, preparation, and presentation of legal topics to help laypersons understand legal concepts and recognize, avoid, and resolve legal disputes in some cases. She conducted mock small claims court hearings and prepared her students as lawyers and witnesses in our fall capstone before actual D.C. Office of Administrative Hearing administrative law judges. The judges were awestruck at her students' ability to grasp the complex legal issues presented in the case.

Ms. Kovarik showed a superhuman ability to tackle challenging assignments with intentionality, grit, poise, and flexibility. A perfect example is Ms. Kovarik's leadership during our Human Rights Capstone Mock Trial. The Human Rights Mock Trial presents a human rights issue wrapped in a mock trial case. The high school students have only a few weeks to learn the law, trial procedure, and the facts and witnesses in the case before they perform as lawyers and witnesses. Due to COVID-19, we were uncertain if the 10-year-old competition that trains over 400 local high school students in trial advocacy would take place. This was the first time Street Law hosted the Human Rights Mock Trial virtually. Doing anything the first time can be harrowing, but Ms. Kovarik was clear-eyed and intentional. She understood the educational and civic value of the simulated trial experience for her students, she did not let anything get in her way. As a direct result of her efforts, Ms. Kovarik's students showed an excellent grasp of the mock trial problem, courtroom procedures, and advocacy skills.

Teaching Street Law has little to do with conventional approaches that merely provide information. Ms. Kovarik created learning opportunities by using role-plays, case studies, hypothetical situations, videos, news articles, mock hearings, and numerous other participatory strategies to make the law tangible and relevant to her students. Ms. Kovarik built her students' abilities to speak, listen, critically assess authorities, deliberate rationally and persuasively, apply the law to facts, synthesize legal concepts, and evaluate the justness of laws and procedures. Teaching at Coolidge High School would be a challenge even for a veteran teacher. Ms. Kovarik came to class each day with new ideas and enthusiasm and continuously challenged her student's notions of law and justice.

In addition to her success in the classroom, Ms. Kovarik was also active in my seminar discussions and experiential exercises. She was enthusiastic in her participation, provided constructive comments to her colleagues, and showed insight during group rounds. Finally, Ms. Kovarik's weekly journals containing observations of her teaching experience reflected critical self-evaluation and thoughtful analysis of the teaching methods she employed.

Finally, Ms. Kovarik has a genuine interest in the well-being of others. Her school liaison raved about Ms. Kovarik's selflessness, connection with her students, and subject matter expertise.

Ms. Kovarik was an all-star in my course. I strongly recommend Ms. Kovarik to you. Please contact me if I can provide you with additional information.

Sincerely yours,

Charisma Howell

Charisma Howell

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Casey Kovarik very highly for a clerkship in your chambers. Casey was a student in my Evidence class last fall. She is very smart, motivated, and a strong writer. As her stellar performance in my class and in law school overall attests, she is an excellent student. I have no doubt that she will also make an excellent clerk.

A double political science and economics major and champion triathlete at UCLA (and a member of the waterski team), Casey brought all the qualities associated with these achievements – motivation, focus, and organization, among others – to law school. I met Casey last August when she was the first to show up to office hours I had scheduled to meet students before the beginning of remote classes. I expected an informal conversation about her background, interests, and career plans. Casey was more interested in finding out how I was going to run the class, how she should approach the study of Evidence, and what my expectations for students were. From that point on, Casey was regularly in my office hours to discuss, among other questions: the meaning of various Rules, problems from our casebook, questions from my quizzes, issues that had come up in class, and hypotheticals she had thought of. In class, she volunteered frequently, provided knowledgeable answers when I called on her, and asked very good questions of her own. Simply put, Casey kept me on my toes.

Casey's exam was one of the best in the class and earned her an A. My Evidence exam tries to simulate the quick pace of evidentiary arguments at trial by asking students to discuss two dozen evidentiary problems that come up during a trial scenario. Casey's exam answers were succinct, organized, and well written. She identified an issue, made the relevant argument, and moved on.

At a meeting toward the end of the semester, I asked Casey about a bike propped up against the wall behind her. I learned then that she had been a triathlete in college, and that before coming to law school she had ridden her bike cross-country, staying with local hosts and building homes with Habitat for Humanity along the way. As Casey described to me, the ride confirmed many things for her, not the least of which was that she was going to devote her career to public service long term and as soon as the opportunity presented itself run for office. Casey strikes me as someone who will be a very effective elected official.

In the meantime, I urge you to hire Casey as a law clerk. She has strong intellectual and writing abilities and is efficient and well organized. I am confident she will be a great asset in your chambers.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

Tanina Rostain
Professor of Law

Tanina Rostain - tr238@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I enthusiastically and unreservedly recommend Casey Kovarik for a judicial clerkship.

Casey Kovarik was a student in my class, Legal Practice: Writing and Analysis, in the 2019-2020 academic year, at the Georgetown University Law Center. The Legal Practice course is an intensive full-year course of study taught by professors, graded (with the exception of last year, when mandatory pass/fail was implemented), and accorded four credits. The students attend two hours of class time each week and are required to research, write, and rewrite a formal memorandum in the fall semester, along with assignments covering other types of legal communications, such as professional emails and oral presentations of research. In the spring, they research, draft, rewrite, and argue a multi-issue appellate brief involving a matter of constitutional law. The class concludes with a ten-day midterm at the end of the fall semester and a ten-day final examination at the end of the year, during which the students are asked to independently research and draft an objective memorandum and an appellate brief, respectively.

Casey was a standout student. First, she was exceptionally motivated. Although a strong writer from the outset, Casey fully engaged in the process of learning and applying new approaches to research and writing. She was receptive to feedback, and her written assignments were thoughtful and submitted in a timely manner. In the spring semester, in the unit on appellate advocacy, Casey's writing met the challenges posed by more complex materials and law. Her work demonstrated mastery of the skills and concepts covered, including researching and using legal authorities, applying analytical paradigms like deductive and analogical reasoning, and presenting her work in a clear, well-structured legal argument.

Second, Casey has a dynamic presence, and was among the most engaged and active participants in class discussions. She asked questions and contributed insights that frequently prompted further conversation on relevant issues. She was a leader and a team player in group exercises, always ready to dive into the collective task of problem-solving. She was, unsurprisingly, a top performer at oral arguments. Casey is also bright, interesting, and personable; I enjoyed talking with her in office hours and we have remained in contact. Her maturity and wherewithal were displayed when the pandemic struck and, in the chaos of disrupted plans, systems, and norms, Casey maintained a firm, positive outlook. She does not shy from new experiences, and, while assiduously goal-oriented, will confront the inevitable disappointment, reflect, and move forward with greater knowledge.

In sum, Casey Kovarik is passionate about law and excited to forge her path in this profession, with an emphasis on litigation. I have no doubt that she is fully qualified to perform the challenging work of a judicial clerkship. I believe she would relish exposure to complex legal issues and would quickly become a valued member of chambers. I hope that you meet her. Please call or e-mail me if you would like to discuss her candidacy further.

Sincerely,

Sonya Bonneau

Sonya Bonneau - sgb29@georgetown.edu

LAW OFFICES OF THE PUBLIC DEFENDER
[redacted], Deputy Public Defender
Bar No.: [redacted]
7500 East Imperial Highway, Suite 224
Downey, CA 90242
Telephone: (562) 803-7135
[redacted]@pubdef.lacounty.gov
Attorney for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. [redacted], Defendant.	Case No. [redacted] 1538.5 SUPPLEMENTAL BRIEF

TO: THE HONORABLE JUDGE TROY DAVIS, PRESIDING JUDGE OF DEPARTMENT 3 OF THE DOWNEY SUPERIOR COURT, AND TO JACKEY LACEY, DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, AND/OR HER REPRESENTATIVE:

Please take notice of this supplemental brief to the motion to suppress pursuant to California Penal Code Section 1538.5 on September 18, 2020, or as soon thereafter as the motion may be heard, in Department 3 of the above listed court.

Dated this 18th day of September 2020.

Respectfully submitted,

RICARDO D. GARCIA,
PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By: [redacted]
Deputy Public Defender
Attorney for Defendant

STATEMENT OF FACTS

On July 2, 2019 officers responded to a call regarding a noise complaint at [redacted]. The 911 caller stated they heard a woman yelling and an object being moved around in one of the apartments above them. Officers arrived at the apartment complex and as they looked around the area they found that [redacted] [defendant's] window was broken. After noticing the window, officers proceeded to knock on her door. When [redacted] [defendant] answered the door, officers informed her that they had received a noise complaint and were checking on the apartment. Officers asked her if anyone else was inside the apartment. She told them no. [redacted] [Defendant] explained that she had been drinking at the pool in her apartment complex and said that may have been the reason she was loud.

Officers asked her why the window was broken. She told them she was just trying to get inside her apartment. Officers asked no follow-up questions. [redacted], the defendant's landlord, came up to the officers and asked what was going on. Officers told [redacted] [landlord] they received a noise complaint and were checking on the situation. [redacted] [Landlord] said "it's the boyfriend" with no further explanation and not in response to any question directed to her.

The officers became fixated on entering [redacted] [defendant's] apartment and repeatedly stated that they needed to speak to [redacted] [defendant's] boyfriend, despite having no evidence beyond the landlord's speculation that he was present in the apartment. Officers requested [redacted] [defendant] let them into her apartment, but she declined to consent. [redacted] [Defendant] was adamant about knowing her rights and refused to let them in without a warrant. Despite [redacted] [defendant] assuring officers multiple times that she was ok, that she did not need their assistance, and that she would not consent to officers entering her home, the officers remained at her front door, refused to let her return inside, and continuously demanded to be allowed inside her apartment.

After more back and forth between the officers and [redacted] [defendant], [redacted] [defendant] became visibly frustrated and upset. She stated that she did not trust the officers and that

she knows they "shoot to kill." [redacted] [Defendant] then said she felt bad for the Black officer on the scene and that all three officers were harassing her. One of the officers responded to [redacted] [defendant] "you sound ridiculous" at which point she allegedly spit at him. Subsequently, all three officers tackled [redacted] [defendant] to the ground. She was then handcuffed, put in a patrol car, and taken to the station.

ARGUMENT

Officers immediately treated [redacted] [defendant] as a suspect, not a victim as is required by the community caretaking doctrine. There were no articulable facts which justified the detention or requests to enter [redacted] [defendant's] home, and no exigent circumstances which made immediate entry necessary. The entire detention was unlawful, its prolonged nature especially so, which was far beyond the necessary time to make the community caretaking visit. For these reasons, the officers' observations while detaining [redacted] [defendant] should be suppressed as fruit of the poisonous tree.

COMMUNITY CARETAKING CANNOT BE PART OF A CRIMINAL INVESTIGATION

Officers acted as if conducting an investigation, which is antithetical to the protocol for these community caretaking interactions. "[T]he community caretaking exception may only be invoked when officers are not acting to solve a crime," officers are to treat those they interact with as victims, not as suspects. *People v. Morton*, 8 Cal. Rptr. 3d 388, 393 (Cal. Ct. App. 1st 2003). Officers treated [redacted] [defendant] as a suspect, not a victim from the moment they knocked on her door until the end of the interaction, not in accordance with community caretaking requirements.

In *Morton* officers were called regarding alleged cultivation of marijuana and a potential robbery of that same marijuana on defendants' property by a neighbor. *Id*. at 389-90. The court found that the officers were not acting under community caretaking when they entered the closed property because a few marijuana leaves and debris on the fence of the property, a small depression under the

fence, and a neighbor who said he "believed" they were cultivating marijuana did not support the conclusion "that a warrantless entry was required to protect defendants' life or property." *Morton*, 8 Cal. Rptr. 3d 395.

After [redacted] [defendant] told the officers she was okay, they asked why the window was broken, if this was her apartment, and if they could see her driver's license. Officers noted she had a cut on her face and blood on her clothing but did not ask more questions about her injuries nor offer any medical assistance. One minute into the interaction, the officers were treating [redacted] [defendant] as a suspect, not as a victim as they are required to do by the community caretaking doctrine. Officers continued to ask if they could check inside the apartment throughout the interaction despite [redacted] [defendant's] repeated denials and a lack of basis for entry. Officers had no reason to believe that they needed to enter the apartment for the safety of those inside. A broken window with an innocent explanation from the resident is even less of an indication of illegal behavior or imminent harm requiring immediate entry than the presence of marijuana on a fence. Therefore, because the existence of marijuana did not justify entry and search, a broken window certainly does not provide justification for entry nor the detention of [redacted] [defendant] while officers badgered her for consent. In this case officers did not act within the purview of their community care taking function, but rather conducted a baseless investigation, which resulted in [redacted] [defendant's] unlawful detention. The detention was a violation of [redacted] [defendant's] Fourth Amendment rights.

THERE WAS NO BASIS FOR DETENTION BECAUSE OFFICERS LACKED PROBABLE CAUSE

For detention to be lawful, "an officer's suspicion must be supported by some specific, articulable facts reasonably consistent with criminal activity." *People v. Espino*, 202 Cal. Rptr. 3d 354, 361 (Cal. Ct. App. 6th 2016). Curiosity or a hunch is not enough. *Id.* Officers do not contend they had probable cause of illegal activity justifying the search.

THERE WAS NO BASIS FOR DETENTION PENDING A SEARCH BECAUSE THERE WERE NO EXIGENT CIRCUMSTANCES

Neither community caretaking duties nor exigent circumstance justified detaining [redacted] [defendant] in order to search her home. As explained in *Ovieda*, while examining the ruling in *Ray*, the Supreme Court of California stated, "although police do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception… officers must possess an objectively reasonable basis for believing that an occupant was seriously injured or threatened with such injury" to enter the residence based on those exigent circumstances. *People v. Ovieda*, 7 Cal. 5th 1034, 1049 (Cal. 2019) (discussing *People v. Troyer*, 51 Cal. 4th 599, 602 (Cal. 2011)).

In *Ovieda* the defendant was suicidal and his friends called the police to help prevent him from killing himself. *Id.* at 266. There were weapons in the house with which he was attempting to commit suicide. *Id.* The police were able to successfully remove him from the house but returned to search because they thought that the existence of weapons was enough to warrant a search. The court disagreed, stating that the existence of weapons does not indicate an imminent threat and, without an imminent threat, the officers cannot enter a private residence without a warrant or probable cause. It is important that officers' ability to search a home without a warrant are limited because "[i]f all that is required is the possibility that someone in the house might require aid, any officer on patrol might urge that people in homes often need help and [could enter] to make sure assistance was not required." *Ovieda*, 446 P.3d 262, 272.

There was no indication of self-harm or weapons in [redacted] [defendant's] apartment. The police had even less reason to search her apartment than the officers did in *Ovieda*, where the California Supreme Court ruled officers did not have cause to search the home. There were no exigent circumstances requiring a search and no articulatable facts supporting need for entry. There was no basis for officers to believe there were any occupants in [redacted] [defendant's] home that were

seriously injured or threatened with such an injury. Consequently, the officers had no lawful ability to detain Ms. Johnson [defendant] in order to search her apartment.

DETENTION MAY BE NO LONGER THAN NECESSARY TO EFFECTUATE THE PURPOSE

Officers did not have probable cause to detain [redacted] [defendant] for any amount of time and, even if they initially had cause, the detention was illegally prolonged. A detention may initially be lawful, but can become illegal if prolonged beyond the time necessary to resolve the initial detention. *People v. McGaughran*, 25 Cal.3d 577 (1979).

In *Espino*, an officer pulled over the defendant, and found a small rock of what he thought was crack cocaine. Upon inspecting the object, the officer found it was actually a diamond. *Id*. at 358-59. Though the officer had reasonable suspicion to search the defendant initially, once the officer determined rock was not an illegal substance he was required to release the defendant from custody and refrain from further searches. *Id.* at 364. A subsequent search of the defendant's car was ruled to be inadmissible despite the defendant's consent, because it was given during an unlawfully prolonged detention. *Id.*

Here, officers never had articulable facts amounting to probable cause to detain [redacted] [defendant] and even if the court finds they did, the officers detained [redacted] [defendant] for much longer than a welfare check required. After she calmly told officers she was okay, did not need assistance, and asked them to leave, the detention should have promptly ended. It is not tolerable for officers to extend a detention longer than necessary to resolve the reason for the interaction. *Espino*, 202 Cal. Rptr. 3d at 361. The officers unlawfully prolongedly detained her, treated her as a suspect instead of a victim as required under the community care taking doctrine, and continued demanding entry into her home without any basis. Because interactions between police and individuals should only take as long as is necessary for the purpose of that stop or interaction, the officers' prolonged

detention of [redacted] [defendant] was unlawful as it exceeded the time appropriate for the welfare check.

OBSERVATIONS MADE DURING AN ILLEGAL DETENTION ARE INADMISSIBLE

Any observations the officers made during the detention of [redacted] [defendant] are inadmissible as fruit of the poisonous tree. The officers detained [redacted] [defendant] for twenty minutes, badgering her with questions, demanding entry, and generally treating her as a suspect, counter to the purpose of community caretaking and without probable cause. Because the detention was unlawful, any observations and evidence gathered during that time are inadmissible as fruit of the poisonous tree.

CONCLUSION

Based on the reasons stated above the police did not have a valid basis to detain [redacted] [defendant] and therefore all observations and evidence obtained after the unlawful detention must be suppressed as fruit of the poisonous tree. The defense respectfully requests the 1538.5 motion be granted and the evidence named above be suppressed.

Dated this 18th day of September 2020.

Respectfully submitted,

RICARDO D. GARCIA,
PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By:_____
[redacted]
Deputy Public Defender
Attorney for Defendant

Applicant Details

First Name	**Ryan**
Last Name	**Kun**
Citizenship Status	**U. S. Citizen**
Email Address	**r.kun17@cmlaw.csuohio.edu**
Address	**Address** **Street** **4034 Stonehaven Rd** **City** **South Euclid** **State/Territory** **Ohio** **Zip** **44121** **Country** **United States**
Contact Phone Number	**2169256326**

Applicant Education

BA/BS From	**University of Cincinnati**
Date of BA/BS	**May 2018**
JD/LLB From	**Cleveland State University--Cleveland-Marshall College of Law** **http://www.nalplawschoolsonline.org/content/OrganizationalSnapshots/OrgSnapshot_324.pdf**
Date of JD/LLB	**May 1, 2022**
Class Rank	**25%**
Law Review/ Journal	**Yes**
Journal(s)	**Cleveland-Marshall Global Business Law Review Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations **American Inn of Court**

Recommenders

Laser, Christa
c.j.laser@csuohio.edu
Keller, Anne
akeller@shakerheightscourt.org
2164911323

References

The Honorable Anne Walton Keller, akeller@shakerheightscourt.org, (216) 870-1735;

The Honorable KJ Montgomery, (216) 334-9434;

The Honorable Donald C. Nugent, (216) 357-7160.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ryan Kun

4034 Stonehaven Road, Cleveland, OH 44121 | (216) 925-6326 | r.kun17@cmlaw.csuohio.edu

April 14, 2022

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year student at Cleveland-Marshall College of Law, and I am writing to apply to the Term Law Clerk position in your chambers for 2022-2023. I have developed strong legal research and writing skills through my three judicial clerkships and work as an editor for Cleveland-Marshall's *Global Business Law Review*. I am dedicated to pursuing a career in the judiciary, and it would truly be an honor to begin my legal career as a clerk in your chambers. I am graduating in May 2022 and sitting for the July 2022 bar exam. I would welcome the opportunity to relocate to Richmond, VA for the duration of this clerkship.

My journey towards a career in law began in the USSR back in 1989. As the Iron Curtain started to weaken, political upheaval made it unsafe for our family. Being Jewish under the Soviet regime, my family members were not treated with the same liberties or due process guarantees privileged to other citizens. They were second class members of society whose rights were scrutinized and hindered by the local police, governances, and above all else, the courts. While on paper, my parents and grandparents were labeled as equal citizens, the reality of the situation demonstrated a double standard for opportunities and punishment under law. Despite having professional degrees and careers, my mother and father knew this was no place to raise and start a family. My parents, who at the time were not much older than I am today, decided to make a run for it and found a new home in Cleveland, Ohio.

Initially with the thought of pursuing medicine, I studied biomedical sciences at the University of Cincinnati. However, during my time at the University, my parents began to unravel the stories and problems they faced during their past lives in the USSR. Inspired by the struggles of my ancestry, my heart was set on pursuing a career in law. As a law student, I focused my studies on constitutional related matters earning grades of A and A- in courses such as Constitutional Law, Family Law, and HIPAA and Privacy. Outside the classroom, however, I have made the courts my home.

During my tenure at Cleveland-Marshall, I have clerked for judges at the federal, county, and municipal levels. In these roles, I worked closely with the judges, drafting memoranda and decisions in civil, criminal, small claims, class action, traffic, and property issues. As a legal extern for Judge Donald C. Nugent at the United States District Court for the Northern District of Ohio, I wrote memoranda and orders dealing with *habeas corpus* motions, real estate disputes, privacy violations, and class action lawsuits. Additionally, I observed multiple trial proceedings including preliminary hearings, sentencings, change of pleas, and jury trials. Through this externship, I built a solid foundation to succeed as a Term Law Clerk through direct exposure to federal issues of law.

Please find my resume and unofficial transcript attached to this application. Thank you for your consideration. It would be an honor to serve in your chambers, and I hope to hear from you soon to discuss this position further.

Respectfully,

Ryan Kun

Ryan Kun

r.kun17@cmlaw.csuohio.edu
(216) 925-6326
Cleveland, OH

EDUCATION

Cleveland-Marshall College of Law, Cleveland State University **Cleveland, OH**
Juris Doctor Candidate *May 2022*

- GPA: 3.54, Class Rank: Top 1/3rd
- CALI Excellence for the Future Award for "High A" in Scholarly Writing (2020)
- CALI Excellence for the Future Award for "High A" in HIPAA and Privacy (2021)
- Cleveland-Marshall Award for Excellence in Health Law (2022)
- *Global Business Law Review*, Business Editor
- Jewish Law Students Association, President (2020), Secretary (2021)
- William K. Thomas American Inn of Court, Pupil

University of Cincinnati **Cincinnati, OH**
Bachelor of Science in Biological Sciences *May 2018*
Bachelor of Arts in Judaic Studies
Certificate in Modern Hebrew

- Alpha Epsilon Pi Fraternity, Vice President
- Student Government, Member

EXPERIENCE

Shaker Heights Municipal Court **Shaker Heights, OH**
Head Law Clerk *May 2020 - Present*

- Draft the Court's responses and answers to various motions presented by litigants
- Conduct research and write memoranda in the areas of property, housing, criminal, civil, and Ohio rules of procedure
- Observe and draft decisions and findings of facts for the small claims, housing, criminal, and eviction dockets
- Oversee the defaults docket and ensure parties properly file all motions and documents before scheduled hearings

Cuyahoga County Court of Common Pleas **Cleveland, OH**
Judicial Externship with The Honorable Judge Patrick F. Corrigan *Spring 2022*

- Assist the chamber clerk in drafting journal entries and orders for motions and decisions decided by the Judge and Magistrates
- Research and draft memorandum pertaining to issues arising from cases as well as general legal questions inquired by the Judge and Magistrates of the Court
- Observe civil custody and juvenile criminal case proceedings including dispositions, trials, arraignments, attorney conferences, and preliminary hearings

The United States District Court for the Northern District of Ohio **Cleveland, OH**
Judicial Externship with The Honorable Judge Donald C. Nugent *Fall 2021*

- Drafted memoranda and orders for motions filed by parties relating to pretrial motions, magistrate decisions, *habeas corpus* motions, and constitutional questions
- Observed civil and criminal cases from arraignment through trial, including settlement conferences, suppression hearings, change of pleas, sentencings, and *voir dire*
- Researched federal issues pertaining to cases and provided answers to questions presented by the Judge and members of his chambers

LANGUAGES AND SKILLS

- Fluent and proficient in Russian and Hebrew
- Trained in Westlaw and Lexis Database research

Cleveland State University

Unofficial Transcript for Ryan Kun (CSU ID: 2659113)

Not to be used as grade verification for external purposes.
Information protected by Family Educational Rights Act section 438(b)(4)(B).

Preferred name is displayed on the unofficial transcript. Your legal name will be displayed on your official transcript.

******* Beginning of Undergraduate Record *******

Summer Semester 2015

College : Transient Student

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
BIO	200	Introductory Biology I	3.0	3.0	A-	11.1
BIO	201	Introductory Bio Lab I	1.0	1.0	A	4.0
Term GPA:	3.77	**Term Totals:**	4.0	4.0		15.1
Cum GPA:	3.77	**Cum Totals:**	4.0	4.0		15.1

Good Academic Standing

******* Beginning of Law Record *******

Fall Semester 2019

College : Law Degree Seeking
Major : Law

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
LAW	504	Legal Writing	3.0	3.0	B+	9.9
LAW	511	Contracts	4.0	4.0	B	12.0
LAW	512	Torts	4.0	4.0	B+	13.2
LAW	515	Legislation & Regulatory State	4.0	4.0	B+	13.2
Term GPA:	3.22	**Term Totals:**	15.0	15.0		48.3
Cum GPA:	3.22	**Cum Totals:**	15.0	15.0		48.3

Spring Semester 2020

College : Law Degree Seeking
Major : Law

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
LAW	504	Legal Writing	3.0	3.0	P	0.0
LAW	506	Criminal Law	3.0	3.0	P	0.0

LAW	513	Civil Procedure	4.0	4.0	P	0.0
LAW	514	Property	4.0	4.0	P	0.0
Term GPA:	0.0	**Term Totals:**	14.0	14.0		0.0
Cum GPA:	3.22	**Cum Totals:**	29.0	29.0		48.3

Fall Semester 2020

College : Law Degree Seeking
Major : Law

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
LAW	516	Constitutional Law	3.0	3.0	A-	11.1
LAW	609	Estates & Trusts	4.0	4.0	A-	14.8
LAW	618	Family Law	3.0	3.0	P	0.0
LAW	658	Copyr, Patent & Trademark Law	3.0	3.0	A-	11.1
LAW	791	Scholarly Writing	2.0	2.0	A	8.0
Term GPA:	3.75	**Term Totals:**	15.0	15.0		45.0
Cum GPA:	3.45	**Cum Totals:**	44.0	44.0		93.3

Spring Semester 2021

College : Law Degree Seeking
Major : Law

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
LAW	516	Constitutional Law	3.0	3.0	A	12.0
LAW	538	Innovation Law Seminar	3.0	3.0	A-	11.1
LAW	643C	Legal Profession	3.0	3.0	B+	9.9
LAW	684	Employment Law	3.0	3.0	A	12.0
LAW	692	Corporations	4.0	4.0	B	12.0
Term GPA:	3.56	**Term Totals:**	16.0	16.0		57.0
Cum GPA:	3.49	**Cum Totals:**	60.0	60.0		150.3

Fall Semester 2021

College : Law Degree Seeking
Major : Law

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
LAW	621	Criminal Procedure I	3.0	3.0	B+	9.9
LAW	671	Environmntl Law & Regulation	3.0	3.0	A-	11.1
LAW	690	HIPAA and Privacy	3.0	3.0	A	12.0
LAW	741	Cybersecurity I	3.0	3.0	A-	11.1
LAW	815C	Externship-Judicial	3.0	3.0	P	0.0
LAW	818	Global Business Law Review	1.0	1.0	P	0.0
Term GPA:	3.67	**Term Totals:**	16.0	16.0		44.1
Cum GPA:	3.53	**Cum Totals:**	76.0	76.0		194.4

Spring Semester 2022

College : Law Degree Seeking
Major : Law

Course	Catalog Nbr	Description	Attempted	Earned	Grade	Points
LAW	649	Environ Law in Bus & Real Est	3.0	3.0		0.0
LAW	661	Evidence	4.0	4.0		0.0
LAW	701	Ohio Bar Exam Strat&Tactics	3.0	3.0		0.0
LAW	817C	Externship-Pub Interest I	3.0	3.0		0.0
LAW	818	Global Business Law Review	1.0	1.0		0.0
Term GPA:	0.0	**Term Totals:**	0.0	0.0		0.0
Cum GPA:	3.53	**Cum Totals:**	76.0	76.0		194.4

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April 14, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am an Assistant Professor at Cleveland-Marshall College of Law and it is my pleasure to recommend Ryan Kun for the federal clerkship at your chambers.

I have known Ryan since I came to Cleveland-Marshall in the fall of 2020 and he has taken all the upper-level courses that I provided at the university, specifically our Intellectual Property survey course and Innovation Law. As his professor, I had the opportunity to observe Ryan's participation and interaction in class and evaluate his comprehension of legal material. I am happy to say he is an outstanding student in all respects.

Due to the nature of intellectual property law, a great deal of it is rooted in federal law. As such, the coursework involved in Ryan's studies during my survey course introduced him to the interpretation and analysis of a number of federal statutes and regulations. Ryan has always had a thorough understanding of the material, providing thoughtful commentary and exceptional legal analysis. I am fully confident such critical analysis skills developed in my class will serve to benefit Ryan in your chambers with whatever task presented to him.

In addition to my survey course, Ryan took Innovation Law. This seminar course required students to write a legal research note on a topic related to contemporary technology and its relation to the world of law. Ryan's writing and research capabilities as shown in this course were exemplary. He wrote one of the top papers in the class. I am confident that you will be happy with Ryan's writing skills, dedication, and enthusiasm if you choose to select him as your clerk.

Ryan has also shown himself to be an active member of the Cleveland-Marshall community. Outside the classroom, Ryan served as President for our Jewish Law Students Association and is an Editor for our Global Business Law Review Journal, further showcasing his commitment and legal writing skill. In sum, I believe Ryan would make an excellent addition to your chambers. Please do not hesitate to contact me for any more information.

Christa Laser - c.j.laser@csuohio.edu

Magistrate Anne Walton Keller
Shaker Heights Municipal Court
3355 Lee Road
Shaker Heights, Ohio 44120

216-491-1323 (Office)
216-491-1314 (Fax)
216-870-1735 (Cell)

akeller@shakerheightscourt.org

June 21, 2021

To whom this may concern:

It is my pleasure to recommend Ryan Kun for the Federal Law Clerk position. I am a Magistrate at the Shaker Heights Municipal Court and Ryan's direct supervisor. The Shaker Heights Municipal Court is one of the busiest single-judge courts in the State of Ohio. By bordering the City of Cleveland and containing five municipalities in its jurisdiction, the Court handles a large amount of criminal, traffic, and civil cases. As such, the Court relies heavily on our law clerks to work efficiently and diligently to address a variety of issues presented to the Court and provide a concise analysis.

During his time at the Court, Ryan has many responsibilities serving as a law clerk. Ryan conducts research and writes memoranda for the Judge and Magistrates in a variety of areas including property, criminal, civil law as well as the Ohio rules of procedure. Ryan also observes court proceedings and is involved in drafting decisions for criminal and civil cases. Additionally, Ryan helps draft and edit orders relating to motions presented by litigants. Throughout all of this, Ryan consistently provides the Court with concise and thorough answers to our legal questions in an intelligent and insightful manner. He has demonstrated a remarkable work ethic, intelligence, exceptional writing skills, and a great team player. Everyone here at the Court can truly rely on Ryan to get the job done.

In addition to his work at the Court, Ryan is an Associate for Cleveland-Marshall College of Law Global Business Law Review Journal. He also serves as President of the Jewish Law Students Association. Ryan has shown his ability to time manage all of his responsibilities efficiently and perform them to the highest standard. I am confident Ryan can bring the same amount of success and drive to a Federal Law Clerk position.

Sincerely,

Anne Walton Keller
Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOEY D. WISEMAN, JR.,	)	Case No. 1:17 CR 464
	)	1:21 CV 259
	)	
Petitioner,	)	JUDGE DONALD C. NUGENT
	)	
vs.	)	
	)	MEMORANDUM OPINION AND ORDER
	)	
UNITED STATES OF AMERICA	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court upon Joey D. Wiseman, Jr.'s ("Petitioner's") Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. (ECF #88). The government filed a Response in Opposition and Petitioner filed a Reply. (ECF #90, 91). This matter is now fully briefed and ready for disposition. For the reasons set forth herein, the petition (ECF #88) is DENIED.

I.

On November 8, 2017, a federal grand jury indicted Petitioner on two counts for knowingly possessing with intent to distribute a mixture or substance containing a detectable

amount of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(C) (Counts 1 and 2); and one count for unlawful possession of a firearm in violation f 18 U.S.C. § 922(g)(1) and 924(a)(2) (Count 3). On November 14, 2017, the Court appointed Attorney James A. Jenkins as counsel for Petitioner. Petitioner pleaded not guilty to all charges in the indictment.

On February 28, 2018, Petitioner filed a *pro se* Motion to dismiss Counsel Due to Ineffective Assistance of Counsel. The Court denied the Motion on March 9, 2018. A jury trial commenced on June 12, 2018, after which the jury found Petitioner guilty on Counts 2 and 3 and not guilty on Count 1. On September 19, 2018, the Court sentenced Petitioner to a term of imprisonment of 262 months as to Count 2 and 120 months as to Count 3 to run concurrent, six years supervised release, and a special assessment of $200. Petitioner filed a timely notice of appeal, and the Sixth Circuit affirmed his conviction. Petitioner then filed a Section 2255 petition to vacate the sentence on the basis of ineffective assistance of counsel. Specifically, Petitioner argues that his attorney was ineffective because he (1) failed to provide Petitioner with discovery pertinent to his case; (2) he failed to file a Motion to Suppress Evidence; and, (3) he failed to file a Motion to Dismiss the Indictment after Petitioner requested the Motion.

II.

A. Standard for Relief Under § 2255

A petitioner that moves to vacate, set aside or correct a sentence pursuant to 28 U.S.C. §2255 must demonstrate that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) it is otherwise subject to

collateral attack. *See* 28 U.S.C. § 2255; *Hill v. United States*, 368 U.S. 424, 426-27 (1962). As such, a court may grant relief under § 2255 only if a petitioner has demonstrated "a fundamental defect which inherently results in a complete miscarriage of justice." *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003) (internal quotation and citation omitted); *see also, United States v. Todaro*, 982 F.2d 1025, 1028 (6th Cir. 1993). To "obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). The burden is on the petitioner to prove his constitutional rights were denied or infringed by a preponderance of the evidence. *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980). If a § 2255 motion, as well as the files and records of the case, conclusively show that the petitioner is entitled to no relief, then the court need not grant a hearing on the motion. *See* 28 U.S.C. § 2255; *see also Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996) (recognizing that evidentiary hearing is not required when the record conclusively shows that petitioner is not entitled to relief).

B. Ineffective Assistance of Counsel

For Petitioner to prevail on an ineffective assistance of counsel claim, he must show that his counsel's performance was deficient, and that the deficient performance prejudiced him to the extent that the proceedings were unfair and the result was unreliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This requires a showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id*. Judicial scrutiny of counsel's performance must be "highly deferential," as defense counsel's competence is presumed. *Id; Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Petitioner must rebut this presumption by proving, not simply alleging, that his attorneys' representation was unreasonable

under prevailing norms and that the challenged actions were not sound strategy. *Kimmelman*, 477 U.S. at 347.

III.

A. Failure to Provide Discovery Pertinent to the Case

Petitioner first alleges that his attorney failed to provide discovery information pertinent to his case. Specifically, Petitioner refers to his *pro se* Motion to Dismiss Counsel claiming his attorney failed to provide discovery requested by Petitioner by not providing certain disks. (ECF #21). A hearing took place on March 8, 2018 where it was established Petitioner failed to receive said discovery due to a transfer to a different Jail. After the hearing, Petitioner received the discovery information requested.

A court deciding an ineffective assistance of counsel claim must determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 690. It is also recognized that counsel is presumed to have rendered adequate assistance of counsel. *Id.* To establish prejudice against counsel, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."*Wiggins v. Smith*, 539 U.S. 534 (Citing *Strickland*, 466 at 649).

Here, Petitioner's attorney had a hearing with the government regarding Petitioner's discovery request. At the hearing, it was learned that Petitioner had not received the discovery material. Once aware of the situation, Petitioner's attorney quickly mitigated the situation by re-sending Petitioner the requested discovery material. Therefore, Petitioner cannot show that his attorney's actions were outside the range of competent assistance. Additionally, Petitioner fails to

demonstrate how the delay caused him any prejudice.

B. Failure to Make a Argument in a Suppression Motion

In the second claim of ineffective assistance of counsel, Petitioner states his attorney was ineffective by failing to file a motion to suppress evidence requested by Petitioner. Specifically, Petitioner states he was questioned illegally because he was recorded during a non-custodial questioning. (ECF #21). Petitioner made multiple requests to his attorney to file a motion to suppress evidence and his attorney ignored those requests. Counsel's reasoning for ignoring those requests was that he found them to be without merit. (R. 71: Apr. 4, 2018, Hrn'g Tr. At PageID 313-14).

Petitioner fails to demonstrate that his attorney was ineffective by failing to file a motion to suppress evidence. The facts establish Petitioner was not in custody when he was questioned. There is no law that requires police to inform a defendant they are being recorded when not in custody. *United States v. Robinette*, No. 2:13-CR-89, 2014 WL 4187011, at *2 (E.D. Tenn. Aug. 21, 2014). The act of unwarned recording of a defendant's non-custodial statements is irrelevant. *Id.* It was therefore appropriate for counsel to ignore requests to file meritless motions.

C. Failure to Make a Argument in Motion to Dismiss the Indictment

In the third claim of ineffective assistance of counsel, Petitioner alleges his attorney was ineffective because he failed to file a motion to dismiss the indictment. Petitioner claims the indictment was not supported by sufficient evidence. (ECF # 21). Due to the fact Petitioner was convicted at trial, he cannot establish prejudice stemming from any alleged perjury at the Grand Jury stage of the proceedings. No prejudice can be established by the presentation of false evidence at the Grand Jury if a petit jury subsequently convicts the defendant. *See United States*

v. Morgan, 384 F.3d 439, 443 (9th Cir. 2004).

Certificate of Appealability

Pursuant to 28 U.S.C. § 2253, the Court must determine whether to grant a certificate of appealability as to any of the claims presented in the Petition. 28 U.S.C. § 2253 provides, in part, as follows:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In order to make "substantial showing" of the denial of a constitutional right, as required under 28 U.S.C. § 2255(c)(2), a habeas prisoner must demonstrate "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issue presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).)

Where a district court has rejected the constitutional claims on the merits, the petitioner must demonstrate only that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484.

For the reasons stated above, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the Court declines to issue a certificate of appealability.

IV.

For the reasons set forth above, Petitioner's Motion to Vacate, Set Aside or Correct Sentence In Accordance With Title 28 U.S.C. § 2255 (ECF #88) is DENIED. Because the files and records in this case conclusively show that Petitioner is entitled to no relief under § 2255, no discovery or evidentiary hearing is required to resolve the pending Motion. Furthermore, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed.R.App.P. 22(b). IT IS SO ORDERED.

_____

DONALD C. NUGENT
Senior United States District Judge

DATE:_____

Applicant Details

First Name	**Madeline**
Last Name	**Labovitz**
Citizenship Status	**U. S. Citizen**
Email Address	**madlab@live.unc.edu**
Address	**Address** Street **303 Maupin Ave.** City **Salisbury** State/Territory **North Carolina** Zip **29144** Country **United States**
Contact Phone Number	**7042321525**

Applicant Education

BA/BS From	**Wofford College**
Date of BA/BS	**May 2018**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 8, 2021**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Journal of Law and Technology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Environmental Law Mott Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Elengold, Kate
elengold@email.unc.edu
919-962-2642
Gurvich, Rachel
gurvich@email.unc.edu

References

Amy Armstrong | 843-527-0078 | amy@scelp.org

Tirrill Moore | 919-610-2806 | tmoore@selcnc.org

Professor Rachel Gurvich | 617-640-9764 | gurvich@email.unc.edu

Professor Kate Elengold | 919-962-2642 | elengold@email.unc.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Madeline A. Labovitz
(704) 232-1525 | madlab@live.unc.edu | 1104 Spring Meadow Dr., Chapel Hill, North Carolina 27517

August 21, 2020

The Honorable Elizabeth Hanes
United States District Court for the Eastern District of Virginia
701 East Broad St.,
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year law student at the University of North Carolina seeking a clerkship in your chambers for the 2021-23 term. As an aspiring litigator with strong academic credentials, I am especially interested in a magistrate clerkship because it will allow me to experience the inner workings of our legal system from the beginning of a case while researching and writing about complex legal issues. I am also eager to work in Richmond because I hope to begin my legal career in Virginia, where I have frequently visited while growing up.

I have the research and writing skills to succeed as a clerk in your chambers. As an intern for two environmental non-profits, I researched complex legal issues implicating multiple federal statutes and federal and state administrative procedures to draft briefs and memoranda. I also helped prepare for litigation by analyzing expert testimony and the legislative histories of environmental statutes. Next year, I will further refine my research and writing skills through an externship with Justice Ervin at the North Carolina Supreme Court and a Judicial Clerkship Writing course.

I also work especially well in busy, fast-paced environments and maintain my attention to detail even while juggling many projects in evolving situations. Last year, my student Note analyzing the framework of natural gas pipelines' cybersecurity regulations was selected for publication by the *North Carolina Journal of Law and Technology*. In addition, I competed at the National Environmental Moot Court Competition, where I was awarded best oralist. Moreover, after one of my 2L summer internships was canceled in late May due to the COVID-19 pandemic, I was determined to find a meaningful opportunity to enhance my skills. I worked diligently—while already working another job—to secure a position with the South Carolina Senate Judiciary Committee. When that internship was also canceled just days before the start date due to a COVID outbreak, my first employer extended my internship, and I was able to gain valuable experience throughout the summer.

Attached please find my resume, writing sample, law school transcript, references and letters of recommendation from Professors Rachel Gurvich and Kate Elengold. It would be a privilege to clerk in your chambers next year. Thank you for your consideration, and I look forward to hearing from you soon.

Respectfully,

Madeline A. Labovitz

Attachments

Madeline A. Labovitz

(704) 232-1525 | madlab@live.unc.edu | 1104 Spring Meadow Dr., Chapel Hill, North Carolina 27517

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina
Juris Doctor, expected May 2021
GPA: 3.62 (Top 20%)

- Notes Editor, *North Carolina Journal of Law and Technology*
- Competing Member, Holderness Moot Court Environmental Team
- Best Oralist & Semifinalist, 2020 National Environmental Law Moot Court Competition
- Center for Climate, Energy, Environment, and Economics Scholar
- Treasurer, Jewish Law Association
- Pro Bono Participant (31 hours)

Wofford College, Spartanburg, South Carolina
Bachelor of Science, *cum laude*, Biology, Minor in Government, May 2018
GPA: 3.59; Dean's List, four semesters

- Employed 12 hours per week during the 2017-2018 academic year

EXPERIENCE

Hon. Sam Ervin IV, Supreme Court of North Carolina, Raleigh, North Carolina
Judicial Extern, August-December 2020

- Draft bench briefs and petitions memoranda and observe oral arguments.

James, McElroy, & Diehl, Charlotte, North Carolina
Law Clerk, August 2020-Present

- Conduct research and write legal memoranda on contracts and tort issues.

Prosecutors and Politics Project, University of North Carolina School of Law, Chapel Hill, North Carolina
Research Assistant, January 2020-present

- Research state media outlets and legislation to identify prosecutor involvement in criminal justice issues as part of a project that aims to bring scholarly attention to the democratic accountability of elected prosecutors and increase understanding of the relationship between prosecutors and politics through empirical study.

Southern Environmental Law Center, Chapel Hill, North Carolina
Law Clerk, May-August 2020

- Conduct research and write legal memoranda to prepare for litigation relating to regional and national environmental and energy issues including public utility commission hearings, concentrated animal feeding operations, and Clean Water Act rulemakings.
- Enhance research and oral skills through a presentation on amicus briefs.

South Carolina Environmental Law Project, Georgetown, South Carolina
Legal Intern, May-August 2019

- Researched and analyzed statutes and case law on the admissibility of complex modeling system evidence, incidental take permits, and the Endangered Species Act to draft legal memoranda.
- Prepared appellate briefs on the sufficiency of pleadings, administrative procedures, and res judicata and collateral estoppel issues.

PUBLICATIONS

Your Natural Gas is not Cyber-Secure: A Two-Fold Case for Why Voluntary Natural Gas Pipeline Cybersecurity Guidelines Should Become Mandatory Regulations Overseen by the Department of Energy, 21 N.C.J.L. & TECH. 217 (2020).

INTERESTS

Marathon training, hiking, and learning to cook

Madeline Labovitz
University of North Carolina School of Law
Cumulative GPA: 3.625

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Andy Hesick	B+	4	
Contracts	Deborah Gerhardt	A	4	
Research, Reasoning, Writing, and Advocacy I	Rachel Gurvich	B+	3	
Torts	Richard Saver	A-	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Eric Muller	B+	4	
Criminal Law	Carissa Hessick	A	4	
Property	Kate Elengold	A	4	
Research, Reasoning, Writing, and Advocacy II	Craig Smith	A	3	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Donald Hornstein	B+	3	
Energy Law	Jonas Monast	B+	3	
Evidence	Cathrine Dunham	A-	4	
Health Privacy Law	Kathryn Marchesini	B-	1	
NC Pretrial Litigation--Torts	Robert Jenkins	A-	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Associations	John Coyle	P	4	
Criminal Procedure-Investigation	Joseph Kennedy	P	3	
Electricity and Renewable Energy Finance	John McArthur and Mark Griffith	P	3	
Gender Violence and the Law	Deborah Weissman	P	3	
Professional Responsibility	Janine Zanin	P	2	

Due to the Covid-19 pandemic, the school moved to a pass/fail grading system and a P indicates a passing grade.

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write in support of Madeline Labovitz's application for a clerkship. I have no doubt that Maddie would be a valuable addition to your chambers. She is smart, conscientious, careful, and kind.

Maddie was a student in my Property class at UNC School of Law in the spring of 2019. She performed very well on the exam; Maddie received the third highest score in the large 1L section. I was not surprised to see Maddie perform so well. Although she is quiet in class, she was always engaged and attentive. As both a teacher and a future colleague, I appreciate Maddie's style – she carefully listens, synthesizes the materials, and speaks up when she has something thoughtful to say.

When I asked Maddie why she was interested in clerking, she talked about a clerkship as the ultimate challenge. She compared clerking to other challenges in her law school career – trying out for moot court, competing in the journal competition, working to publish a note. Recognizing the value and opportunity of such challenges, Maddie pushed beyond her comfort zone and competed. And, in every area, she excelled. I have no doubt that Maddie will be equally as successful as a law clerk. As a former law clerk, I understand that respect for challenge and opportunity is critical to high performance and high-quality work product.

Maddie has also committed to join the Consumer Financial Transactions ("CFT") Clinic in the spring of 2020. The CFT Clinic is a four credit, semester-long course that includes seminar, case rounds and supervision related to the students' representation of live clients and work with organizational partners. The students act as primary counsel for clients, under my direct supervision, in matters related to credit and debt. Clinic is not a required course at UNC Law, and it is reputed to be a significant amount of work. I'm thrilled that Maddie has chosen to take advantage of an opportunity that is equal parts challenging and rewarding. Not only will she be a careful and empathetic lawyer for clients in need, but she will be conscientious and collaborative with me and her peers. I look forward to working with her!

I recommend Maddie for a clerkship in your chambers. Her character, capacity, and demeanor would be a welcome addition to any chambers. Please feel free to contact me at elengold@email.unc.edu or (919) 962-2642 if you have any questions.

Kind Regards,

Kate Sablosky Elengold
Assistant Professor of Law
UNC School of Law

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Madeline (Maddie) Labovitz is bright, mature, and hard-working. She is also a consummate professional: her sincere dedication to providing the best work product she can is matched only by the diligence with which she pursues that goal in any context. Her strong research and writing skills and warm, engaging personality would make her an asset to your chambers. In short, she would be an excellent law clerk.

I am a Clinical Associate Professor at UNC School of Law, where I teach Research, Reasoning, Writing and Advocacy ("RRWA") to first-year law students. I have known Maddie since the fall of her 1L year, when she became a student in one of my RRWA I classes. Taught in small sections of about 15 students, RRWA provides foundational, practice-oriented instruction which helps students develop the skills necessary to communicate professionally as attorneys. Working both individually and in teams, students learn the fundamentals of legal research, reasoning, and writing, primarily by simulating important aspects of law-office work.

Because of the small size of RRWA classes, Maddie's investment in her education, and her diligence about staying in touch in the time since she was my student, I have gotten to know Maddie very well. During RRWA I, I read many drafts of Maddie's work and met with her for numerous one-on-one meetings. Even beyond the six individual conferences required by our rigorous RRWA curriculum, Maddie requested additional meetings with me to clarify her understanding and continue working on her writing. Since the end of RRWA, Maddie has stayed in close contact with me, meeting with me frequently to discuss course selection, employment opportunities, and clerkships. And these meetings have been supplemented by numerous informal conversations around campus—where she can, in normal times, always be found studying or working on behalf of one of the many student organizations in which she has an active role.

Even as a 1L, Maddie was a skilled and proficient legal researcher with excellent judgment and a keen understanding of when a research task demanded depth, breadth, or both. As early as her first semester of law school, Maddie was not only able to execute but also to cogently explain sophisticated research strategies for answering a variety of legal question. Since then, Maddie has only sharpened her research skills through her coursework, summer employment, journal, and moot court.

Maddie is an analytical thinker who approaches difficult issues with care and nuance. As we worked through assignments in class, I could see her thinking on the relevant legal issues evolve and deepen. She is also particularly thoughtful about policy issues and fluent in how to make policy-based arguments. And her science background gives her a unique perspective that many law students lack.

Maddie is also a strong writer. She can dig through a complicated record for the key facts and craft a straightforward, persuasive narrative. But more importantly, her legal analyses are well organized, cogent, and thorough. She is especially good at deriving accurate, sophisticated rules from legal authorities, even complex statutes and messy case law. Maddie's analogical reasoning is excellent and, accordingly, she has a good instinct for which cases to rely on to convincingly support her argument. Her application of law to fact is thorough, deliberate, and persuasive. She makes good judgments about how to structure her writing to set up a helpful legal framework, meet her audience's expectations, and guide her reader with clear, easy-to-follow prose.

Maddie's writing has only improved in the time since I have taught her. This improvement, which I can see clearly when I read her subsequent work, is attributable to additional experience, of course, but also to carefully-chosen coursework, writing-heavy summer employment experiences, moot court and journal work, and, importantly, Maddie's dedication to refining her craft.

Maddie's oral communication skills shine in formal settings, as is apparent from her strong performance—including a Best Oralist award—in the National Environmental Moot Court Competition. But her informal communications are just as strong. In both settings, Maddie thinks on her feet and provides thorough, satisfying answers based on extensive knowledge and preparation. She is also a thoughtful interlocutor whose questions often clarify complex issues for the person with whom she is speaking. And Maddie is an active and compassionate listener, making any conversation with her a pleasure.

Maddie is dedicated to public service and giving back to her community. One way this has manifested is in her passion for environmental law. This passion has driven Maddie's coursework, summer jobs, student writing (including a note that was

Rachel Gurvich - gurvich@email.unc.edu

selected for publication), and extracurricular involvement.

Maddie is mature and has an impeccable work ethic. In the classroom, her contributions consistently reflected thoughtful preparation and always elevated the discussion. When her class worked in small groups, Maddie's brand of leadership by example consistently kept her group on task and engaged. A And Maddie not only graciously accepts, but affirmatively seeks out, constructive feedback on her work, which has been integral to her growth as a legal writer.

Interpersonally, Maddie is warm and engaging. She strikes up an effortless rapport with her peers as well as her professors. Even during the most difficult portions of 1L year—and in the last few months during a global pandemic—Maddie maintained an unfailingly positive attitude, which brightened the spirits of those around her.

In short, I believe Maddie would be a wonderful addition to your chambers. I would be happy to answer any questions you may have about Maddie. Please feel free to contact me directly at (617) 640-9764 or gurvich@email.unc.edu.

Best regards,

Rachel Gurvich

Madeline A. Labovitz

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Writing Sample

I prepared the attached discussion section as part of a memorandum written during my summer internship with the Southern Environmental Law Center. I have permission from SELC to use this memorandum excerpt as a writing sample with redactions for confidentiality. The confidential information has been redacted and includes the party names, court name where necessary, and the rule on which SELC contemplated submitting an amicus brief.

Discussion

Each court has its own criteria for accepting amicus briefs, however, judges are given deference about how to apply these requirements. According to the Seventh Circuit, "whether to allow the filing of an amicus curiae brief is a matter of 'judicial grace.'" *Voices for Choices v. Ill. Bell Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003). While district courts each have their own specific rules concerning amicus briefs, amicus briefs in the circuit courts are generally governed by the Federal Rules of Appellate Procedure. The United States Supreme Court adheres to its own procedural rules in defining the parameters of amicus briefs. Therefore, SELC's ability to file an amicus brief will depend on the court in which SELC intends to file.

I. SELC Would Likely Be Granted Leave to Submit an Amicus Brief in the Northern District of California

While amicus briefs are most commonly used in appellate courts, the Northern District of California allows, and uses, amicus briefs. *See, e.g.*, *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003); *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1113-14 (N.D. Cal. 2017). In fact, "[d]istrict courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *NGV Gaming, Ltd. v. Upstream Point Molate, LLC.*, 335 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)).

However, the decision of "whether to allow Amici to file a brief is solely within the Court's discretion." *Cal. v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019). Nevertheless, courts have generally "exercised great liberty" in allowing amicus briefs. *Id*. (quoting *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254 SBA, 2007 WL 81911,

at *3 (N.D. Cal. Jan. 14, 2008)). Further, "there are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is desirable to the court." *Id*.

While the Northern District of California has not promulgated any local rules for filing amicus briefs, the judges have not issued any standing orders concerning amicus briefs, and there is little case law surrounding amicus briefs, courts in the Northern District of California have denied motions to leave to file an amicus brief if the brief is not "timely, useful, or otherwise necessary" to the court. *Karuk Tribe of CA. v. U.S. Forest Service*, No. C 04-4275 SBA, 2005 WL 8177401, at *2 (N.D. Cal. July 1, 2005). For example, in *Abadia-Peixoto*, an applicant's motion to leave to file an amicus brief supporting the plaintiff's motion to dismiss was denied because it would have only addressed "purely legal issues as to the sufficiency of the pleadings." *Abadia-Peixoto v. U.S. Dept. of Homeland Sec.*, 277 F.R.D. 572, 576 (N.D. Cal. 2011). Therefore, the court reasoned that "any unique perspectives or information the proposed *amici* might have to offer [would not be] especially pertinent." *Id.* The plaintiffs were "represented by competent counsel who . . . addressed the relevant legal issues" and the amicus brief would not be particularly useful. *Id*.

Similarly, in *Karuk*, the court denied a motion for leave to file an amicus brief because the court did not find it to be "timely, useful, or otherwise necessary." *Karuk Tribe of CA*, 2005 WL 8177401, at *2. Notably, the applicant was involved in litigation in the District Court of Oregon against the same defendants, but that fact did not play a role in the decision to deny leave to file an amicus brief. *See id*. Instead, the court held that the party's application was untimely as the case had been pending since October 2004 but the applicant did not seek leave to file an amicus brief until May 2005, "four days before Plaintiff's reply brief was due" and "several days

after Defendant's only scheduled brief on the merits was filed." *Id*. Moreover, the amicus brief would not have been useful or otherwise necessary for the court because the applicant was in no better position than the parties to "provide the court with a history of the development and implementation of the Northwest Forest Plan," which is what the amicus brief intended to accomplish. *Id*.

The only reported opinion from the Northern District of California granting leave to file an amicus brief granted the motion to an applicant that had been involved in the incidents leading up to the case. *Sonoma Falls*, 272 F. Supp. 2d at 920. In *Sonoma Falls*, plaintiffs alleged that the defendants had engaged in "unfair competition" and "intentionally interfered with their contractual relationship [to build an Indian gaming casino] with the Tribe." *Id.* at 920. Specifically, after the plaintiffs had already entered into contracts with the Tribe to develop gaming casinos, the defendants approached the Tribe and eventually entered into an agreement to fund, develop, and construct a casino for the Tribe. *Id*. at 920-21. This constituted a breach of the plaintiff's exclusive agreement with the Tribe. *Id*. at 921. While the Tribe was not a party to the litigation, the court granted the Tribe leave to submit an amicus brief because their insight would be useful to the court. *See id*. at 925. The court found "it appropriate to consider the Tribe's position because of its involvement in the events leading to [the] case and its interest in the contracts at issue." *Id*.

Here, SELC's position is not directly analogous to any motion for leave to file an amicus brief that resulted in a judicial opinion in the Northern District of California. Nevertheless, SELC will likely be granted leave to file an amicus brief because they are not a party to the litigation, and they are interested. First and foremost, SELC is not a party to the litigation. While involved in a similar case concerning [redacted], SELC is no more a party to the

litigation than the movants who were granted leave to file an amicus brief in *Sonoma Falls*. In *Sonoma Falls*, the movants were heavily involved in the actions that led up to the suit but were not parties to the litigation. *Sonoma Falls*, 272 F. Supp. 2d at 925. SELC was not involved in the actions leading up to the case in the Northern District of California, nor is SELC a plaintiff or defendant in the case.

Rather, SELC's position is most similar to the movants in *Karuk*. In *Karuk*, the party that moved for leave to file an amicus brief was involved in litigation against the same defendant in another court. *Karuk Tribe of CA*, 2005 WL 8177401, at *2. While the motion was denied, the court wrote an opinion to discuss why and the movant's case against the defendants in another court was not why the motion to leave to file an amicus brief was denied. *Id*. Unlike the movants in *Karuk*, SELC is not involved in litigation against the defendants in the Northern District of California, but rather has a similar case pending in [redacted]. Just as the movants in *Karuk* were not parties to the litigation, SELC is unlikely to be considered a party.

A second factor that weighs in favor of granting SELC's motion to leave to file an amicus brief is that SELC has an interest in the case in the Northern District of California. In S*onoma Falls*, the movant did not have a particular "interest" but because of their role in the events leading up to the case, the movant had a unique perspective. *Sonoma Falls*, 272 F. Supp. 2d at 925. Regardless, the court made it clear that when a movant will face legal "ramifications beyond the parties directly involved," then they are interested and should be granted leave to file an amicus brief. *Id*. SELC is a non-party that will certainly face ramifications from the Northern District of California's decision. SELC is involved in a case concerning [redacted] in [redacted] and therefore, how [redacted] is resolved in the Northern District of California will likely affect SELC's pending case in [redacted].

II. SELC Would Likely Be Granted Leave to File an Amicus Brief in the Ninth Circuit

Amicus brief in federal circuit courts are governed by Rule 29 of the Federal Rules of Appellate Procedure, which dictates that any amicus curiae, aside from the United States, "may file a brief only by leave of court or if the brief states that all parties have consented to its filing." FED. R. APP. P. 29 (a)(2). If a potential amicus is not able to obtain consent of all the parties, then the party may file a motion with the court for leave to file an amicus brief. *Id*. at (a)(3). The motion must include the proposed brief as well as a statement of (1) interest and (2) the brief's desirability and relevance on the case. *Id*. at (a)(3)(A)-(B). The remainder of Rule 29 addresses the technical form and procedural requirements of the brief. Therefore, the only substantive requirements for amicus participation in the federal circuit courts are interest, desirability, and relevance.

Rule 29 provides limited guidance on granting leave to file an amicus brief. Generally, the rule has been interpreted liberally, but "[f]ederal appeals court jurisprudence discussing the parameters of amicus participation is fairly sparse." John Harrington*, Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RESERVE L. R. 667, 668 (2005). In *Miller-Wohl*, the Ninth Circuit emphasized that "[a]n amicus curiae is not a party to litigation." *Miller-Wohl Co. v. Comm'r of Lab. and Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). Rather, the "classic role" of an amicus curiae is to assist "in a case of general public interest, [supplement] the efforts of counsel, and [draw] the court's attention to law that escaped consideration." *Id.* at 204. Moreover, for an amicus to "take a legal position and present legal arguments . . . is a perfectly permissible role." *Id*.

Unfortunately, the Ninth Circuit has very limited case law concerning amicus briefs. In fact, "[a]side from the rules and comments, the federal courts of appeals—with a few notable

exceptions—have not said much about the desirability or undesirability of amicus briefs." Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 394 (2015). Two of those notable exceptions came from the Seventh and Third Circuits, which addressed the relatively "open-ended" practice of granting leave to file an amicus brief that was typical for appellate courts. *Id*. (citing *Voices for Choices,* 339 F.3d at 544 and *Neonatology Assoc., P.A. v. C.I.R*., 293 F.3d 128, 132 (3d Cir. 2002)). While the two decisions would not be binding on our motion to leave to file an amicus brief in the Ninth Circuit, the cases provide insight into two courts' jurisprudence on amicus briefs where the Ninth Circuit has been silent.

In *Voices for Choices*, the Seventh Circuit denied two motions for leave to file amicus briefs. 339 F.3d at 543-44. In denying the motions, Judge Posner explained that judges on the Seventh Circuit would not grant permission to file an amicus brief if the brief "essentially duplicates a party's brief." *Id*. at 544. Judge Posner explained that "the criterion for deciding whether to permit the filing of an amicus brief should be . . . whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the parties' briefs." *Id*. at 545. The court ruled that the proposed amicus briefs would not assist the court because the briefs merely contained "a few additional citations not found in the parties' briefs, and slightly more analysis on some points" but essentially covered the same ground as they party the amicus sought to support. *Id*.

Judge Posner went on to provide four examples of when an amicus brief may be useful in a case. *Id*. An amicus brief may useful when "a party is inadequately represented" or the applicant has "a direct interest in another case that may be materially affected by a decision in this one." *Id*. An amicus brief may also be useful when an amicus articulates "a distinctive

perspective" or presents "specific information, ideas, arguments, etc. that go beyond what the parties whom the amici are supporting have been able to provide." *Id*. However, none of these circumstances were present in *Voices for Choices*. *Id*.

In *Neonatology*, however, the Third Circuit took the position that motions for leave to file amicus briefs should be liberally granted. *Neonatology Assoc.,* 293 F.3d at 132. The court described amicus briefs as a valuable resource to which the court would be deprived access under a restrictive approach. *Id*. at 132-33. Specifically, the Third Circuit does not require the amicus to be impartial or motivated by pecuniary concerns. *Id*. 131-32. In the same vein, the amicus does not need to show that the party its brief would support is unrepresented or inadequately represented. *Id*. at 132. Therefore, if an amicus has interest, the brief is desirable, and the brief discusses matters relevant to the case, the court will grant the motion for leave to file an amicus brief. *Id*. at 129.

In *Neonatology* itself, the defendants, taxpayers who had participated in the Voluntary Employees' Beneficiary Association, appealed a tax courts' decision that upheld the Commissioner of Internal Revenue's finding that the defendants had erroneous claimed deductions from their payments to the insurance plan. *Id*. The amici were physicians that had participated in the same insurance plan as the defendants. *Id*. In their statement of interest, the amici stated that they had a claim similar to the defendants, but unlike the defendants, they did not release their claims to a life insurance company. *Id*. Instead, the amici filed litigation against the life insurance company that was funding the defendant's appeal in their own claims against the insurance plan. *Id*. at 129-30.

Therefore, the court held the amici had an interest because the case would impact the amici's rights. *Id*. at 130. The court further held that the amici's brief was relevant and desirable

because "it alerts the merits panel to possible implications of the appeal." *Id*. at 133. Instead of injecting new issues into the case, the amici sought to make sure that the "court does not inadvertently stray into issues that need not be decided." *Id*. at 133-34.

Here, SELC's proposed amicus brief would be permissible under *Voices for Choices*. Specifically, SELC would take the role of an amici that has a direct interest in another case, in [redacted], that "may be materially affected by a decision" in the Northern District of California. However, SELC should avoid the same mistake made by the applicants in *Voices for Choices*: SELC's amicus brief must do more than just reiterate a party's arguments. Judge Posner did not expand on what substantively different arguments must be included but SELC would need to do more than utilize a few additional citations and add slightly more analysis. Therefore, if SELC can make arguments distinct from the party they wish to support and assist the judges, SELC would likely be granted leave to file an amicus brief in the Ninth Circuit if the court follows the reasoning in *Voices for Choices*.

SELC's amicus brief would also be permissible under *Neonatology*. While not in the same position as SELC, the amici in *Neonatology* were involved in litigation against the same insurance plan as the parties, and this interest led to the court granting leave to file an amicus brief. Here, SELC is involved in litigation concerning [redacted], the same [redacted] at issue in the case filed in the Northern District of California. Therefore, SELC is interested. While then-Judge Alito did not delve too deeply into the relevance and desirability of an amicus brief in *Neonatology*, it appears that one way to meet those requirements would be for SELC to prevent the court from addressing issues that it should not but SELC must avoid injecting new issues into the case. Therefore, if SELC's amicus brief can strike a balance of being different from what the parties are filing, but not be so different as to create new legal issues they will likely be granted

leave to file an amicus brief in the Ninth Circuit if the court follows the reasoning in *Neonatology*.

III. SELC Would Likely Be Granted Leave to File an Amicus Brief in the Supreme Court

SELC's final option is to submit an amicus brief in the Supreme Court, if the case were to continue to the highest court. "Amicus curiae participation is most prominent in the Supreme Court" where the court's policy "is to allow essentially unlimited amicus participation." John Harrington*, Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RESERVE L. R. 667, 675 (2005).

Rule 37 of the Supreme Court Rules governs amicus briefs. Specifically, the rule only requires that an amicus brief be filed by an attorney admitted to practice before the Supreme Court, provides time limits on when to file an amicus brief depending on the brief's purpose, and a few other technical requirements. SUP. CT. R. 37. Similar to amicus briefs in the circuit courts, an amicus brief may be filed with the consent of all parties or, if consent is withheld, by a motion for leave to file the amicus brief. *Id*. at (3)(b). If consent of the parties is withheld, the court alone determines if an amicus brief may be filed. *Northern Sec. Co. v. U.S.*, 191 U.S. 555, 24 S. Ct. 119 (1903).

The Supreme Court's rules do not provide any concrete restrictions on who may file an amicus brief or what the brief must contain. In theory, anyone may file an amicus brief in the Supreme Court; subsection 6 of Rule 37 states that if counsel for a party authors the brief or a party makes a monetary contribution to prepare and submit the brief, that fact must be indicated in the first footnote of the brief. SUP. CT. R. 37.6. While this is not common practice, it has happened. For example, in *Metlife*, the Supreme Court accepted an amicus brief "authored in whole" by one of the parties' attorneys. Brief for S. Brooklyn Legal Services NYC as Amici

Curiae in Support of Respondent at fn. 1, Metlife v. Glenn, 554 U.S. 105 (2008) (No. 06-923), 2008 WL 899287.

In regard to what the amicus brief may contain, Rule 37 does not provide any strict requirements. The rule states that an amicus brief that provides information to the Court that is relevant and has not already been presented by the parties is helpful, whereas an amicus brief that does not provide such information burdens the Court, "and its filing is not favored." SUP. CT. R. 37.1.

As a result, the Supreme Court has a fairly liberal amicus brief policy. However, the range of amicus briefs that will be accepted is not limitless. For example, in one of the only Supreme Court cases to discuss the reasons for denying an amicus brief, *Northern Securities*, a motion for leave to file an amicus brief was denied because the applicant was not "interested." *Northern Sec. Co*., 191 U.S. at 556. Specifically, the applicant was not "interested in any other case which will be affected by the decision of [*Northern Securities*]." *Id*. Furthermore, the parties were represented by competent counsel. *Id*. The two-paragraph opinion did not describe interest in any more detail and no other Supreme Court case provides reasons to grant or deny a motion to leave to file an amicus brief.

Here, SELC should be able to file an amicus brief with the Supreme Court. While the Supreme Court does not provide much guidance as to who an interested party is, SELC's case pending in [redacted] will likely be affected by the outcome of the decision thereby making them an interested party.

Conclusion

In conclusion, the rules for filing an amicus brief vary by court and jurisdiction. Further, the rules provide little clarity and minimal case law exists, making the matter even more opaque.

However, in all of the courts [redacted] could proceed to—the Northern District of California, the Ninth Circuit, and the Supreme Court—amicus briefs are permitted, and SELC would likely be granted leave to file an amicus brief in each court.

Applicant Details

First Name	**Samantha**
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Contact Phone Number	**5593600638**

Applicant Education

BA/BS From	**University of California-Davis**
Date of BA/BS	**June 2018**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 23, 2021**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**W&M Bill of Rights Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**W&M Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 28, 2020

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, Virginia 23219

Dear Judge Hanes:

I am a third-year student at William & Mary Law School, seeking a judicial clerkship in your chambers beginning in the Fall of 2021. I am ranked in the top 30% of my class, serve as a staff member for the William & Mary Bill of Rights Journal, and lead the Institute of Bill of Rights Law as President. After completing law school, I intend on beginning my legal career in the Southeastern region of Virginia, and clerking in your chambers will provide me an opportunity to immediately contribute to the Virginia legal community.

My legal research and writing background will enable me to immediately contribute as your judicial clerk. Throughout law school, I have developed specialized skills in legal research and analysis through my writing courses, participation on the Moot Court team, membership on the Bill of Rights Journal, and research with Professor Devins. During my research position with Professor Devins, I was given the responsibility of putting together a syllabus for his seminar as well as compiling portions of the Supreme Court Preview Notebook. These tasks required me to ask the right questions for guidance on the projects, sift through different types of materials from court cases to news articles, and organize the resources into a digestible format. Furthermore, I am externing with U.S. District Court Judge Henry Hudson in the Eastern District of Virginia where I am honing in the specific skills required of a judicial law clerk.

Please find enclosed my resume, law school transcript, and a writing sample for your consideration. The writing sample is an appellate brief prepared for my intra-team moot court competition. Also, enclosed are letters of recommendation on my behalf from the following individuals:

Professor Neal Devins
William & Mary Law School
Williamsburg, VA
nedevi@wm.edu
(757) 221-3845

Professor Allison Larsen
William & Mary Law School
Williamsburg, VA
amlarsen@wm.edu
(757) 221-7985

Please let me know if I can provide any other information that would be helpful. I welcome the opportunity to interview with you to further discuss my qualifications and interests in your clerkship. Thank you for your time and consideration.

Sincerely,
Sammy Carey Lamb

Samantha Carey Lamb
350B Witness Ln., Newport News, VA 23608
slcarey@email.wm.edu | (559) 360-0638

EDUCATION

William & Mary Law School, Williamsburg, VA
Juris Doctor Candidate, May 2021
G.P.A. 3.4 (top 30%)

Honors: Marshall-Wythe Scholar; Phi Delta Phi; Public Service Fellowship; Bill of Rights Journal CALI Award (Administrative Law); Moot Court; Blackstone Legal Fellowship
Activities: Institute of Bill of Rights Law - President; Domestic Violence Clinic; Federalist Society - Speaker Chair; Christian Legal Society - Vice President, Events Chair

University of California - Davis, Davis, CA
Bachelor of Arts, Highest Honors, Political Science and Classical Civilizations, June 2018
G.P.A. 3.9

Honors: Phi Beta Kappa; University Honors Program; Clyde Jacobs and Larry Peterman Distinguished Scholar Award (for honors thesis); Political Science Outstanding Senior
Activities: Debate at Davis - President; Phi Kappa Phi - Student Vice-President; Golden Key International Honor Society - President; Orientation Leader & First-Year Peer Advisor
Study Abroad: London School of Economics and Political Science; London, England; Fall 2018
A Tale of Two Cities; London, England & Paris, France; Summer 2014

EXPERIENCE

Honorable Henry E. Hudson - U.S. District Court, Eastern District of Virginia, Richmond, VA Fall 2020
Judicial Extern: Researched jurisdictional issues, § 1983 claims, and health care legislation. Drafted a motion to dismiss and a motion for compassionate release. Observed arraignments, sentencing, and acceptance of pleas.

Clark County District Attorney's Office, Las Vegas, NV Summer 2020
Law Intern: Conducted direct examinations of witnesses at preliminary hearings and at grand jury. Argued in court on motions and sentencing of defendants. Drafted motions to remand defendants, to oppose the withdrawal of plea agreements, and to oppose the release of defendants. Researched Nevada criminal law for a police manual.

William & Mary Law School, Williamsburg, VA Summers 2019, 2020
Research Assistant to Professor Neal Devins: Created the class syllabus for Trump and the Constitution seminar by researching an array of sources, gathering pertinent materials, and compiling reading assignments. Assisted with the creation of notebook materials for the Institute of Bill of Rights Law Supreme Court Preview.

William & Mary Law School, Events and Conferences, Williamsburg, VA Fall 2018 - Present
Student Assistant: Coordinated and executed all law school events, including the annual Supreme Court Preview, Brigham-Kanner Property Rights Conference, Virginia Costal Policy Center Conference, and graduation.

Commonwealth's Attorney's Office - York County, Poquoson, VA Summer 2019
Law Intern: Researched various aspects of Virginia criminal law. Conducted witness interviews and prepared witnesses for trial. Reviewed cases for weaknesses and helped the prosecutors develop a trial strategy. Prepared discovery documents.

DC Law Students in Court, Washington, DC Spring 2017
Program Operations Intern: Served subpoenas, transcribed police tapes, and examined crime scenes to assist with investigations and discovery. Researched statistics and legal issues regarding religiously motivated *Terry* stops and organized a panel and presentation for the DC Judicial Bar Conference.

INTERESTS

Exploring national parks and historic sites, crocheting baby blankets, playing strategic board games

Samantha Lamb
William & Mary Law School
Cumulative GPA: 3.4

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts	James Stern	B+	4.0	
Lawyering Skills I	Pamela Hutchens	H	1.0	
Civil Procedure	Aaron-Andrew Bruhl	A-	4.0	
Criminal Law	Nancy Combs	A-	4.0	
Legal Research & Writing I	Jennifer Franklin	B+	2.0	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Lawyering Skills	Pamela Hutchens	H	2.0	
Legal Research & Writing II	Jennifer Franklin	A-	2.0	
Constitutional Law	Allison Larsen	B	4.0	
Property	Linda Butler	B+	4.0	
Contracts	Nathan Oman	B-	4.0	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Professional Responsibility	Mason Lowe	A-	2.0	
Criminal Procedure I (Investigation)	Jeffrey Bellin	B	3.0	
W&M Bill of Rights Journal	Neal Devins	P	2.0	
Advanced Brief Writing	Jennifer Franklin	P	2.0	
First Amendment - Free Speec & Press	Timothy Zick	B+	3.0	
Trump & the Constitution Seminar	Neal Devins	B+	2.0	
Advanced Issues in Constitutional Law Survery	Allison Larsen	A	3.0	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Writing & Practice: Criminal	Megan Zwisohn	P	2.0	
First Amendment - Religion Clauses	Timothy Zick	P	3.0	
Jury Strategies Seminar	Pamela Hutchens	P	2.0	
ILR Moot Court	Jennifer Franklin	P	1.0	
Evidence	Jeffrey Bellin	P	4.0	

W&M Bill of Rights Journal	Neal Devins	P	1.00	
Administrative Law	Allison Larsen	P	3.0	Received the CALI award

Universal Pass/Fail grading was mandated by the faculty for all Spring 2020 Law classes due to the COVID-19 pandemic. Students had no option to choose ordinary letter grades.

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure II (Adjudication)	Adam Gershowitz		3.0	
Children's Rights Seminar	James Dwyer		3.0	
Family Law Clinic	Lindsay Barna & Darryl Cunningham		3.0	
Judicial Externship	Robert Kaplan		3.0	

Grading System Description

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:
Transcripts report student GPAs to the nearest hundredth. Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth. We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
Except as noted below, students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be a reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is conceivable that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.

COVID-19 PANDEMIC: GRADES FOR THE SPRING 2020 TERM

In response to disruption caused by the global COVID-19 pandemic, the William & Mary Law School faculty voted to require that every course taught at the Law School during the Spring 2020 term be graded Pass/Fail. This change to Pass/Fail grading for the Spring 2020 term will impact students in our Classes of 2020, 2021, and 2022, including in the assignment of class ranks. Students in the Class of 2022 will first be assigned class ranks following completion of the Fall 2020 term. The class ranks of the students in the Class of 2021 will next be recalculated following completion of the Fall 2020 term. The class ranks of the students in the Class of 2020 will next be recalculated following completion of the Spring 2020 term.

William & Mary Law School
P.O. Box 8795
Williamsburg, VA 23187-8795

Neal E. Devins
Sandra Day O'Connor Professor of Law, Professor of Government

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September 04, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Sammy Carey Lamb

Dear Judge Hanes:

I am pleased to recommend Sammy Carey Lamb to you. Sammy is a truly amazing person. She gets things done with a smile on her face. She is super-interested in a broad range of issues and is very bright too. But perhaps more than any student I have worked with—she is unflappable. Mature, responsible, good natured, someone to count on.

Let me start with Sammy's work as my assistant for a program I run at the law school, The Institute of Bill of Rights Law (IBRL). The IBRL brings to campus around a dozen speakers a year and also puts on high profile conferences, most notably the Supreme Court Preview which typically features a half dozen federal courts of appeal judges, a dozen top Supreme Court advocates, and around 6 leading Supreme Court journalists. It is a great event; it was also an event that occupied the full time attention of the law school's event planner for the month or two before the conference. In May 2019, I learned that our events planner was to leave before her replacement could start work on the Preview. Essentially I had no professional staff but I did have Sammy! From June through September, Sammy did all the event planner tasks and much more. She took charge in such a helpful way that I was never stressed and understood that Sammy had my back. At the conference itself, most of the panelists told me that Sammy was amazing. She was; there were lots of small parts and with Sammy the whole was greater than the sum of those parts.

In addition to running the Preview, Sammy also helped me put together course materials for a course that I had never done before—Trump and the Constitution. Sammy researched and put together readings on a broad range of topics, including impeachment, emoluments, congressional investigations, state lawsuits against the federal executive, etcetera. As you might guess, Sammy was fantastic. She was really interested in the topic and engaged with both the reading and with me. During the course of the fall 2019 semester (when I taught the course), I brought in numerous distinguished speakers to give a talk to the law school community and talk too to my class. Sammy helped figure out all logistics and once again I knew I was in good hands.

As you can see, Sammy is immensely capable. She is also kind and interested. I cannot imagine a better person in a collegial office setting. And finally, Sammy is not simply super-organized; she is also very bright. Sammy took my Trump class and was a regular participant. She always had something smart to say and her engagement with the course was contagious. I am very fortunate to have her as a student.

I think the world of Sammy and hope you have a chance to meet her. I think she will be a great addition to your chambers.

Sincerely,

/s/

Neal E. Devins
Sandra Day O'Connor Professor
of Law and Professor of Government

Neal E. Devins - nedevi@wm.edu - 757-221-3845

William & Mary Law School
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Allison Orr Larsen
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September 04, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Applicant Samantha Carey Lamb—"Sammy"

Dear Judge Hanes:

I am a law professor at William & Mary and a student of mine, Sammy Lamb, has applied to be your law clerk. I know Sammy better than I know most law students. Not only have I taught her in three separate classes (Constitutional law, Administrative Law, and Advanced Con Law), but Sammy and I work closely together in connection with the Institute of Bill of Rights Law, an organization that I am taking over directing and in which she leads the student division.

Sammy is a very bright and engaged student who has done well in my classes and improved over time (earning a B in Con Law and then an A in Advanced Con Law and then the CALI award for writing the best exam in Administrative Law). In my Advanced Con Law class Sammy's exam was particularly impressive. She wrote one of the best exams out of a very strong set of exams, and earned one of only a handful of A's I awarded that semester. Sammy's legal analysis in that exam was very organized and clear – she hit every issue and deftly articulated arguments and counter-arguments within the issues she spotted. My exams are accompanied by tight word limits, but this did not stop Sammy from exhausting every claim and doing it well. She demonstrated skill in spotting both doctrinal nuances and also situating them within broader themes of the class. It was very impressive legal analysis, and she repeated it again in Administrative law the following semester. Sammy's performance on the Administrative Law exam is particularly noteworthy because that semester the entire school switched to mandatory pass /fail grading in light of the pandemic. Many of her classmates "phoned it in" assuming (correctly) that under the circumstances it would not take much to earn a passing grade. Sammy was not content to earn a P. She knocked that exam out of the park – spotting every issue I wanted the students to find and analyzing each one thoroughly but succinctly. She would have easily earned an A had I been able to award one.

What is most impressive about Sammy, however, is not something I learned in the classroom. The Institute of the Bill of Rights Law (IBRL) is an organization at William & Mary with its own significant budget that brings speakers and events to campus to discuss important constitutional issues. I work closely with the current director of the Institute and I am taking over as director next academic year; Sammy is the current director of the student division which is a volunteer position. A highlight of the IBRL work every year is the annual Supreme Court Preview in which the "who's who" of the Supreme Court bar – journalists, advocates, professors, and federal judges – come to Williamsburg to discuss the coming Supreme Court term. Traditionally much of the event planning for the Preview is handled by a professional event planner hired by the law school. Last year, however, that event planner unexpectedly quit her post just before the Preview and Sammy – a student with no obligation to do so – just took things over. Sammy managed hotel reservations, car transportation, dinner plans, and speaker series. She was the first person in the building before the event started and the last person at night to leave. She worked tirelessly and often thanklessly to pull the Preview off without a hitch. Without Sammy, quite frankly, I don't think the Preview would have happened last year. She saw a need at the law school and reached out to fill it. She was a true lifesaver and the whole law school community owes her a debt of gratitude.

It is sometimes hard to predict how a student will make the transition to law clerk. With Sammy, that prediction is easy. She is perhaps the most helpful student I have ever encountered. Sammy goes the extra mile and is extremely competent. In my experience many law students are bright and capable of following instructions; but it is rarer to find someone who can anticipate

problems and solve them without putting the small stuff back on my plate. Sammy struck this balance perfectly. She came to me directly when it was appropriate to do so, but did not bother me with details that she could handle herself. If she saw a speaker without water, she did not ask me if we had any…she just found water and delivered it. Her organization skills, can-do attitude and sunny disposition would make her a tremendous asset in chambers where the workloads are often varied and unpredictable.

I have no reservations recommending Sammy to serve as your law clerk; she would be marvelous. Please do not hesitate to contact me should you have any questions.

Sincerely,

/s/

Allison Orr Larsen
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WRITING SAMPLE

I prepared this appellate brief for my intra-team moot court competition. I have excluded all of the first argument on a Fourth Amendment issue written by my partner as well as the title page, parties to the proceeding, table of contents, table of authorities, questions presented, statement of jurisdiction, the constitutional and statutory provisions, summary of the argument, and conclusion. Everything included in this sample is substantially my own work.

STATEMENT OF CASE

In May 2016, Riley B. King moved to Wythe, Jefferson and purchased a home on the edge of town that included twenty acres of land. R. at 2. In addition to the main home, Mr. King's property included a guest house, greenhouses, and a barn. *Id*. The entire property is densely covered with forest and the property is only visible by a vantage point located over several miles away. *Id*. Even with that level of privacy, Mr. King decided to increase his privacy by constructing a tall fence around the entire property, and was the only house within the neighborhood to do so. *Id*. Between the dense forest and fence, any view into or out of the property is obscured. *Id*.

Mr. King partially utilizes the area around his home to operate a farm that grows organic vegetables. *Id*. Most of the produce Mr. King grows is used for home consumption, but he also supplies produce to small restaurants in the area. *Id*. at 2-3. His clients may pick up their produce

from the farm at an appointed time each week and collect their order from a staging area. *Id*. at 3. Mr. King's property also contains a guesthouse, which he occasionally rented to tourists through AirBnb and Cousurfing.com. *Id*. However, since August 2016, Mr. King has rented the property on a long-term basis to a student athlete attending Jefferson State University. *Id*.

In January 2017, the Wythe Police Department received three tips, two of which were from anonymous sources, indicating that Mr. King may be growing more than vegetables on his property. *Id*. at 3-4. The police department opened an investigation with the Drug Enforcement Agency after receiving the third tip. *Id*. at 4. When officers were dispatched to Mr. King's residence, they were unable to see inside of the property due to the high fence and dense forest. *Id*.

The officers then drove to a public park several miles away and climbed a hill that revealed a limited sightline of Mr. King's property. *Id*. Even at the high vantage point, law enforcement was unable to view the property with any detail. *Id*. In order to get a better view, law enforcement launched a drone, with the powerful camera, enabling them to surveil the property for several hours. *Id*. During that length of time, the officers observed several unidentified men load plants into a van. *Id*. The officers identified the plants as marijuana and observed a monetary transaction before the van drove away. *Id*.

The officers then prepared an affidavit that detailed the tips received as well as the observations made using the drone. *Id*. at 4-5. The magistrate issued a search warrant for the greenhouses and guest house. *Id*. at 5. In the deteriorated greenhouse closest to the guesthouse at the far end of the property, the agents found marijuana plants and several bags containing dried marijuana. *Id*.

When Mr. King was faced with ten years to life imprisonment for possession with intent to distribute, Mr. King felt the need to enter into an *Alford* plea, maintaining his innocence, while accepting a lesser punishment of five years. *Id*. at 8. Subsequent to the Court's acceptance of the plea, Mr. King's counsel found that the Wythe Police Department had enhanced footage from the drone surveillance that revealed Mr. King's guest-house tenant was the one loading the marijuana and receiving payment. *Id*. at 8-9. The prosecution did not disclose this evidence to Mr. King's attorney until the appeal, even though the prosecution was in possession of the evidence prior to the plea. *Id*.

ARGUMENT

II. MR KING'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED WHEN THE PROSECUTION WITHHELD EVIDENCE THAT HAD A REASONABLE PROBABILITY OF EXCULPATING MR. KING FROM THE CHARGES PRIOR TO HIS ACCEPTANCE OF AN ALFORD PLEA DEAL.

The enhanced photograph revealing Mr. King's innocence should have been disclosed prior to Mr. King's acceptance of the plea bargain due to the exculpatory nature of the evidence and the due process rights afforded to all individuals under the Constitution. Procedural due process requires the government to follow fair procedures before depriving one of their life, liberty, or property. U.S. CONST. amend. V. In *Brady v. Maryland*, this Court declared that all exculpatory evidence and impeachment information must be disclosed by the prosecutor to ensure the fairness of the trial and the guarantee of due process of law. 373 U.S. 83, 87 (1963). In *United States v. Agurs*, the Court clarified that this duty to disclose material evidence is not

dependent upon the defense's request or the character of the prosecutor, but rather the character of the evidence. 427 U.S. 97, 110 (1976). However, the prosecution does not have to share all useful information with the defendant, *Kyles v. Whitley*, 514 U.S. 419, 436 (1995), only that which has a reasonable probability of undermining the confidence of the verdict. *United States v. Bagley*, 473 U.S. 667, 682 (1985). This Court should hold that evidence exculpating an individual should be disclosed upon its discovery because it directly reveals the innocence of an individual. Furthermore, exculpatory evidence should be recognized as making a plea bargain involuntary and unknowingly because of its tendency to punish innocent individuals fearful of the justice system.

A. Exculpatory evidence should be disclosed prior to the acceptance of a defendant's guilty plea because this type of evidence tends to go directly to the innocence of the individual.

Evidence exculpating an individual must be disclosed to a defendant to lower the risk that innocent people will plead guilty to crimes that they did not commit. In *Brady v. Maryland*, this Court held that the prosecutor has a duty to disclose exculpatory evidence prior to a trial to ensure a defendant is not deprived of the opportunity to present all the available evidence in his defense. 373 U.S. 83, 87 (1963). It has not been determined by this Court whether exculpatory evidence must be disclosed prior to accepting a plea bargain. In *United States v. Ruiz*, this Court did declare that a prosecutor does not need to disclose impeachment evidence prior to accepting a plea deal, because impeachment information goes to the fairness of the trial, not the voluntariness of the plea. 536 U.S. 622, 629 (2002). The Court in *Boykin v. Alabama* held that when a defendant pleads guilty, he forgoes not only a fair trial, but also other constitutional guarantees such as the privilege against self-incrimination, the right to confront one's accusers,

and the right to a trial by jury. 395 U.S. 238, 243 (1969). Hence, the Constitution requires that when the defendant waives his constitutional rights, i.e. a plea deal, he must do so voluntarily, knowingly, intelligently, and with sufficient awareness of the general circumstances and probable consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970).

Although in *Ruiz* this Court did not extend *Brady* rights to impeachment information due to witness credibility being so intertwined with the trial rather than the plea, this Court noted that there was no concern about the innocent pleading guilty in that case. 536 U.S. at 629. Ruiz plead guilty to unlawful drug possession after marijuana was found in her luggage. Id. at 625-26. The plea bargain in that case disclosed that the government would provide "any information establishing the factual innocence of the defendant." Id. at 631. This Court was especially persuaded by this caveat in addition to guilty-plea safeguards established in Rule 11 of the Federal Rules of Criminal Procedure, as it alleviated its constitutional concerns for defendant's rights. Id. This Court did not extend *Brady* rights to the impeachment stage, id. at 636, but left the door open to applying these rights to exculpatory evidence.

Furthermore, the circuits are split regarding the application of Brady rights to exculpatory evidence at the plea bargain stage, indicating the need for a clear answer to this constitutional issue. The Seventh Circuit in *McCann v. Mangialardi* felt that *Ruiz* created a "significant distinction between impeachment information and exculpatory evidence of actual innocence." 337 F. 3d 782, 788 (2003). The court felt uncomfortable resolving the question, but indicated that it saw the failure to disclose evidence revealing a defendant's innocence to be a violation of the Due Process Clause of the Constitution. Id. at 787. The Seventh Circuit Court did not have to apply Brady rights at the plea stage in *McCann* because there was no exculpatory evidence

pointing to McCann's innocence. Id. at 788.

On the other hand, the Fifth Circuit took notice of the Seventh Circuit's reasoning regarding the distinction between impeachment information and exculpatory evidence, but ultimately denied its application in *Alvarez v. City of Brownsville*, claiming to be bound by their precedent in *United States v. Conroy*. 860 F. 3d 799, 802 (2017). In *Conroy*, Pamelia Conroy attempted to defraud the Federal Emergency Management Agency, the Mississippi Development Authority, and the Small Business Administration by trying to receive money for a house in Hurricane Katrina's pathway that Conroy no longer lived in. 567 F. 3d 174, 176-77 (2009). Although Conroy's friend gave a witness statement to the FBI that revealed Conroy's misunderstanding of the government's ability to assist her in the destruction of her prior home, the Fifth Circuit held that this exculpatory evidence did not need to be disclosed before Conroy's guilty plea. Id. at 179. The court determined that *Ruiz* did not make a distinction between exculpatory evidence and impeachment information, and the prosecutor, therefore, was not required under *Brady* to disclose either exculpatory or impeachment information until the trial stage. Id.

In *Alvarez v. City of Brownsville*, Alvarez pled guilty to assaulting a public servant in order to receive a suspended sentence and community supervision rather than jail time. 860 F. 3d at 800. However, several years later during a separate § 1983 case, video evidence was discovered revealing that Alvarez did not assault the officer. Id. Alvarez filed a habeas corpus claim indicating that his *Brady* rights were violated when the Brownsville Police Department withheld this evidence directly showing his innocence. Id. In *Alvarez*, the Fifth Circuit was sympathetic to the Seventh Circuit's distinction between impeachment information and

exculpatory evidence, but reluctantly followed their prior precedent in *Conroy*, which held that there is no distinction and therefore no *Brady* violation at the plea stage under *Ruiz*. Id. at 802. However, their reluctance highlights why the facts matter, and how this might be an area of law where constitutional rights need to be extended. In many cases, the lack of disclosure of exculpatory evidence will lead to innocent individuals going to jail for a crime they did not commit to avoid potentially worse outcomes at trial.

In this case, Mr. King was charged for a crime and his guilty plea was accepted, even though there was exculpatory evidence in the prosecution's possession. Exculpatory evidence goes to the heart of an individual's innocence, as seen in this case where the evidence withheld reveals that it was Mr. King's guest-house tenant selling the marijuana, not Mr. King. The government was in possession of, more than just impeachment information that goes to the potential credibility of a witness, but actual evidence proving Mr. King's innocence. This Court in *Ruiz* noted the importance of the prosecution's promise in the proposed plea agreement to turn over any information revealing the factual innocence of the defendant. See *Ruiz*, 536 U.S. at 631. The Seventh Circuit made this even clearer by drawing a distinction between impeachment information and exculpatory evidence in *McCann*. See *McCann*, 337 F. 3d at 788. Even the Fifth Circuit, who ultimately declined to recognize this distinction due to binding precedent, took pause when the facts showed the grave injustice that occurs when exculpatory evidence revealing a defendant's innocence is not disclosed prior to the acceptance of a plea. See *Alvarez*, 860 F. 3d at 802.

As this Court declared in 1963, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused

is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). By not extending *Brady* rights to the plea bargain stage for exculpatory evidence, this Court would be allowing our criminal justice system to become a proceeding where the accused are not treated fairly and where the innocent can be convicted for a crime they did not commit out of fear for worse consequences. The exculpatory evidence, revealing Mr. King's guest-house tenant was the one selling the marijuana, should have been disclosed prior to the acceptance of Mr. King's plea because this type of evidence went directly to the innocence of the individual.

B. Withholding the exculpatory evidence influenced the knowing and voluntary nature of Mr. King's guilty plea.

Mr. King entered his *Alford* plea with a lack of knowledge as to the general circumstances due to the withheld exculpatory evidence. The Court has declared that a plea of guilty is more than just an admission of conduct, but a conviction, that comes with a waiver of important constitutional rights. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). For these reasons, this Court has established a standard that all guilty pleas must be entered into knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences to ensure the defendant is not deprived of their due process rights. *Brady v. United States*, 397 U.S. 742, 748 (1970). Withholding exculpatory evidence that tends to show a defendant's innocence undercuts the factual basis of guilt that makes the plea knowing, and such evidence should therefore be able to overturn a guilty conviction.

In *Brady v. United States*, this Court held that Brady's plea was voluntary even after potential coercion by a statute allowing a jury verdict to carry a punishment of death while a plea could not. 397 U.S. at 751. This Court found that Brady's plea was voluntary because he was

fully aware of the direct consequences of the plea and made the plea after given advice by competent counsel. Id. at 756. This Court focused on the fact that Brady only changed his mind because his calculus of the circumstances ended up being wrong due to his estimation of the likely penalties attached. Id. at 757. The Court found that a faulty premise is not enough; however misrepresentation or impermissible conduct by a prosecutor would be a relevant circumstance in evaluating the voluntariness and competence of the plea. Id.

In *North Carolina v. Alford*, Alford plead guilty to avoid a death sentence while maintaining his innocence as to actually committing the murder. 400 U.S. 25, 27-29 (1970). Alford recognized that there was strong evidence pointing to his guilt with no substantial evidence leaning towards his innocence. Id. This Court held that this type of plea, where the defendant maintains his innocence in light of pleading guilty, is still voluntary and intelligently made. Id. at 37. This Court pointed out in that case that there was strong evidence of Alford's guilt irregardless of his unwillingness to admit to participation in the crime itself. Id. Therefore, this Court deemed that there was no material difference between this guilty plea and a plea where one admits to the crimes committed. Id.

In *Ruiz*, where the woman was found in possession of marijuana in her luggage, this Court did not extend *Brady* rights to impeachment information regarding the credibility of a witness. 536 U.S. at 633. Impeachment information, although sometimes relevant to the circumstances leading to one's guilty plea, does not carry the same weight as exculpatory evidence. Id. at 629. In *Ruiz*, this Court was comforted by the fact that the prosecutor would have been required to turn over any evidence relating to the factual innocence of Ruiz as a condition of the plea. Id. at 631. The innocence of an individual as revealed by exculpatory evidence goes

directly to the voluntariness and intelligence aspect of a plea bargain, while impeachment information relates to the fairness of a trial. Id. at 633.

Mr. King's situation is entirely different than the circumstances that Brady, Alford, and Ruiz faced, because there was exculpatory evidence, an enhanced photograph showing the actual culprit to be his guest-house tenant, that revealed Mr. King's innocence. See *Brady*, 397 U.S. 742; *Alford*, 400 U.S. 25; *Ruiz*, 536 U.S. 622. In all three of these cases, there was strong evidence revealing the guilt of the defendants, unlike here, where there is strong evidence showing the innocence of King. Id. Furthermore, when King made his *Alford* plea, he did so under the advice of his counsel as to the strength of the prosecutor's case, which as revealed later was wholly inaccurate. This is more than just a mere miscalculation as in *Brady*; this is an acceptance of guilt based on the faulty premise of a strong case. See 397 U.S. at 756-57. Unlike in *Alford*, where the prosecution had a strong case regardless of Alford's acceptance of a guilty plea, the only evidence pointing to King's guilt is his plea. See 400 U.S. at 38. The prosecution misrepresented the strength of its case and knew that King was not the one photographed as distributing the marijuana. This evidence goes to more than just the fairness of the case, but to the actual voluntariness and knowingness of a defendant when pleading guilty.

Applicant Details

First Name	**Emily**
Last Name	**Larrabee**
Citizenship Status	**U. S. Citizen**
Email Address	**emily.r.larrabee@drexel.edu**
Address	**Address** Street **1600 W Girard Ave, Apt 418** City **Philadelphia** State/Territory **Pennsylvania** Zip **19130** Country **United States**
Contact Phone Number	**610-937-5166**

Applicant Education

BA/BS From	**University of Richmond**
Date of BA/BS	**May 2017**
JD/LLB From	**Drexel University Thomas R. Kline School of Law** **https://drexel.edu/law**
Date of JD/LLB	**May 15, 2022**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Drexel Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Sarah, McCurry
sarah@wmmlegal.com
Abu El-Haj, Tabatha
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References

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Sarah L. McCurry, Esq.
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emily R. Larrabee
1600 West Girard Avenue
Apartment 418
Philadelphia, Pennsylvania 19130

June 21, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, Virginia 23219

Dear Judge Hanes:

I am a rising third-year law student at the Drexel University Thomas R. Kline School of Law and I am writing to apply for a 2022-2024 clerkship with your chambers.

As an aspiring federal prosecutor with a broad swath of legal experience both prior to and during law school, I believe I would make a strong addition to your chambers. The breadth of my work experience reflects a deep understanding of the law and its effects on society. Moreover, each of my professional experiences has furthered my writing and communication skills to make me an effective advocate and judicial clerk. At Drexel Law, I was selected to be a Staff Editor for the Volume XIII edition of Drexel Law Review and subsequently selected to serve as Executive Editor of Symposium for the Volume XIV edition of Drexel Law Review. In addition, the Note that I wrote as a Staff Editor was selected for publication in the Volume XIV edition of Drexel Law Review. During my 2L year I also maintained a part-time job as a remote law clerk with Winslow, McCurry & MacCormac, PLLC, where I worked as a paralegal prior to law school. This summer, I am serving as a judicial intern to the Honorable Renée Marie Bumb of the United States District Court for the District of New Jersey. For the fall semester of 2021, I will be serving as a legal intern with the United States Attorney's Office for the Eastern District of Pennsylvania. Each of these positions has given and will continue to give me a unique perspective on the law and an opportunity to fine-tune my writing abilities.

As I look forward to my legal career, I hope to return to Virginia, which is where I am from, where my family resides, and where I hope to settle in the future.

As a part of my application packet and as requested, I have included my resume, law school transcript, and writing sample. Also included are letters of recommendation from Professor Tabatha Abu El-Haj (215.571.4738) at Drexel Law, and Sarah McCurry (804.423.1382), Managing Partner of Winslow, McCurry & MacCormac. If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Emily R. Larrabee

Emily R. Larrabee

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Philadelphia, Pennsylvania 19130 emily.r.larrabee@drexel.edu

EDUCATION

Drexel University, Thomas R. Kline School of Law *Philadelphia, PA*
Juris Doctor Candidate May 2022

GPA: 3.51/4.0
Rank: 23/137 (Top 20%)
Honors: Law Scholar Scholarship recipient (3-year, full tuition, merit-based scholarship); Dean's List, four semesters
Publications: Emily R. Larrabee, *Violence in the Name of the Confederacy: America's Failure to Defeat the Lost Cause*, 14 DREXEL L. REV. (forthcoming 2022).
Activities: *Drexel Law Review*, Executive Editor, Symposium; Women in Law Society, Member

University of Richmond, School of Arts and Sciences *Richmond, VA*
Bachelor of Arts in International Studies with concentration in World Politics and Diplomacy May 2017
Minors in Chinese Studies and Latin American, Latino and Iberian Studies
Activities: Equestrian Team, Captain, 2014-2017; Peer Advisors and Mentors Program, Co-Chair; Freshman Orientation Advisor

University of Hong Kong, Faculty of Social Sciences *Hong Kong, SAR, China*
Study Abroad Experience Fall 2015

PROFESSIONAL EXPERIENCE

United States Attorney's Office for the Eastern District of Pennsylvania *Philadelphia, PA*
Incoming Legal Intern Fall 2021

United States District Court for the District of New Jersey *Camden, NJ*
Judicial Intern to the Honorable Renée Marie Bumb May 2021-Present

- Research procedural and substantive legal issues, including civil rights and statutory violations
- Observe civil and criminal proceedings, including trials, motion hearings, and sentencings

Winslow, McCurry & MacCormac, PLLC *Midlothian, VA*
Law Clerk May 2020-May 2021

- Performed legal research for family law, civil litigation, criminal law, and probate matters
- Observed hearings and trials pertaining to family law, criminal law, and civil litigation

Winslow, McCurry & MacCormac, PLLC *Midlothian, VA*
Paralegal September 2017-August 2019

- Drafted letters, estate documents, motions, and filings while managing multiple deadlines
- Managed daily accounting and weekly invoicing

University of Richmond Digital Scholarship Lab *Richmond, VA*
Research Intern January 2016-May 2017

- Contributed to digital mapping projects that integrated media innovations with developments in the humanities
- Collaborated on the research behind "*Mapping Inequality*," which showed the relationship between racism, economics, and the environment, and was named one of National Geographic's "*Best Maps of 2016*"

Tacos4Ticos *San José, Costa Rica*
Program Intern May 2016-August 2016

- Supervised soccer training sessions, English language classes, and mentoring efforts to cultivate personal and academic success for at-risk youth in violence-stricken neighborhoods around San José
- Advocated for donations and managed documentation and distribution of donations

Drexel University

3141 Chestnut Street
Philadelphia, PA 19104

Transcript Information Report

Unofficial Transcript

As of: Jun-01-2021

Student: Larrabee, Emily R
Univ ID: 14383408
Level: LS

Overall Cum GPA: 3.51 Overall Earned Hrs: 59.00

***Overall Earned Hrs incld Institutional & Transfer Credits*

Term: 201911 Fall Semester 19-20

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 550S 002	Torts	4.00	B+		
LAW 552S 001	Contracts	4.00	B+		
LAW 554S 001	Civil Procedure	4.00	B+		
LAW 565S 003	Legal Methods I	3.00	A-		

Attd: 15.00 Earned: 15.00 GPA Hrs: 15.00 Pts: 50.97 Term GPA: 3.39
Cum Ernd: 15.00 Cum GPA Hrs: 15.00 Cum Pts: 50.97 Cum GPA: 3.39

Academic Standing: *Dean's List*

Term: 201931 Spring Semester 19-20

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 555S 001	Legislation and Regulation	3.00	B+		
LAW 556S 001	Property	4.00	A-		
LAW 558S 001	Criminal Law	4.00	B+		
LAW 566S 003	Legal Methods II	3.00	B+		

Attd: 14.00 Earned: 14.00 GPA Hrs: 14.00 Pts: 47.98 Term GPA: 3.42
Cum Ernd: 29.00 Cum GPA Hrs: 29.00 Cum Pts: 98.95 Cum GPA: 3.41

Academic Standing: *Dean's List*

Term: 202011 Fall Semester 20-21

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 560S 001	Constitutional Law	4.00	A		
LAW 634S 002	Evidence	4.00	A-		
LAW 643S 001	Children and the Law	2.00	A		
LAW 740S 001	Trusts and Estates	3.00	B		
LAW 920S 001	Drexel Law Review	1.00	CR		

Attd: 14.00 Earned: 14.00 GPA Hrs: 13.00 Pts: 47.68 Term GPA: 3.66
Cum Ernd: 43.00 Cum GPA Hrs: 42.00 Cum Pts: 146.63 Cum GPA: 3.49

Academic Standing: *Dean's List*

Term: 202031 Spring Semester 20-21

College: Thomas R. Kline School of Law

Major: Law
Minor:

Program: JD-S-LAW **Degree:** *JD* **Degree Statu:** *Sought*

Course	Course Title	Credit Hours	Grade	Rpt	Hon
LAW 611S 001	Sex, Gender, & the Law	3.00	A		
LAW 620S 001	Administrative Law	4.00	B+		
LAW 644S 001	Family Law	3.00	A-		
LAW 670S 001	Crim Pro Invest	3.00	B		
LAW 830S 001	Professional Responsibility	3.00	A		

Attd: 16.00 Earned: 16.00 GPA Hrs: 16.00 Pts: 57.33 Term GPA: 3.58
Cum Ernd: 59.00 Cum GPA Hrs: 58.00 Cum Pts: 203.96 Cum GPA: 3.51

Academic Standing: *Dean's List*

WINSLOW, MCCURRY & MACCORMAC, PLLC

CHRISTOPHER M. WINSLOW
SARAH L. MCCURRY*
ERIKA E. MACCORMAC
BRANDON S. NEXSEN
STEPHEN A. MUTNICK
KEVIN MUELLER
MICHELLE ANTHONY SNELL
**Also licensed in FL*

1324 SYCAMORE SQUARE, MIDLOTHIAN, VA 23113
PHONE: 804.423.1382 FAC: 804.423.1383

June 1, 2021

Re: Emily Larrabee

To Whom It May Concern:

I take great pleasure in writing to you about Emily Larrabee. Emily has worked for my Richmond based law firm for the last four years. Emily began as my assistant, grew into a paralegal and since attending law school, has served as my law clerk. She was not just my assistant, she was my partner in serving my clients and I am so incredibly proud to be writing this recommendation on her behalf.

Emily exhibits an outstanding legal mind. She has that rare ability to not only see the trees, but also the forest through the trees when tackling a legal problem. Emily is passionate about the law. She takes her responsibilities to her clients to heart. She is not only hard working, but dedicated to her work. When you ask Emily to complete a project, you know that it will get done well and in the time frame that you ask. She doesn't assume she knows the answer – she asks questions, she researches – she confirms she understands the scope prior to taking action. There has never been an instance when I had to ask her to redo an assignment. She gets it done right the first time.

With all that said, the real truth is that Emily is not just a great legal mind. Emily is a great person. Emily is a caring, compassionate human being who is a true joy to work along side.

I have no doubt that she will be an excellent attorney one day – and I know that she will excel in any endeavor she chooses.

Should you have any questions or wish to discuss Emily further, please do not hesitate to reach out to me at (804) 423.1382 or via email to sarah@wmmlegal.com.

Best Regards,

Sarah L McCurry

SARAH L. MCCURRY, ESQ.

June 30, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to enthusiastically recommend Emily Larrabee to your chambers. Ms. Larrabee is a gifted young lawyer, who is liked by her peers. Bright, organized, and an excellent writer, she will make a terrific law clerk.

Emily has taken three courses with me over the last two years. These included two required courses—Legislation and Regulation and our second-year, Constitutional Law. In all three classes, Emily was consistently prepared and capably answered questions about the doctrine. While rarely the first to volunteer to answer a question, Emily invariably spoke clearly and offered comments that were exactly on point when called on. And I called on her often, as a result. This was true even in Legislation and Regulation, which she will fully admit was not her favorite course.

Emily stands out, however, for the consistently exceptional quality of her written work. Each of the three classes involved a substantial research paper. In lieu of a final, my online Constitutional Law course this year asked students to develop a piece of federal legislation and write a 15-18 page memo analyzing its constitutionality. The assignment basically challenged students to write their own exam hypothetical, and they received extra points depending on the number and difficulty of the issues they devised, as well as the depth of their analysis of those issues.

Many students opted to write about salient legislative issues—criminal justice reform or efforts to reign in abuses of executive power. Emily and her partner took a different tack, creating "the SWEET Act . . . intended to target the human and economic costs of diabetes, obesity, dental caries, and other diet-related health conditions." The proposed legislation and analysis of its constitutionality "evidence excellent knowledge of the law" and "mastery of the legal art of applying fact to law," as I wrote at the time. In all, it was "a very clever paper" that "created a very nice hypothetical that raises many issues—showcasing your issue spotting abilities." Indeed, I plan to use it on a future Constitutional Law exam.

Emily's writing was also exemplary in Administrative Law. In addition to an exam, each student is assigned to work with a partner on a case study of an agency of their choice. Partners pick a recent regulatory action, explore the notice-and-comment record, and analyze the effort in relation to debates about when regulation is appropriate. The paper's purpose is to develop students' statutory and administrative research skills. Emily and her partner chose to focus on the EPA's efforts to address lead in drinking water. Their introduction set up the dilemma succinctly: "There is no safe level of lead exposure for humans, and lead is especially harmful to children;" yet, "millions of Americans still get water through lead pipes." And it carried the dilemma through its critique of the EPA's approach to incentivizing the replacement of lead pipes. In all, the paper offered an exceptionally clear account of the statutory authority under which the EPA regulates in this area and demonstrated excellent statutory and administrative research skills. It's Bluebook form was excellent, and she and her partner received an A.

Emily's academic performance in each of the three courses has been first rate. She earned an A in Constitutional Law, after receiving a 94/100 on her paper, and B+s in both Legislation and Regulation and Administrative Law. Emily appears to sometimes struggle with timing on exams—and this explains the gap in performance between the courses. In the Administrative Law exam, for example, Emily's answer to a hypothetical based on the recently decided Arthrex, Inc. v. Smith & Nephew was exceptionally sophisticated. It demonstrated deep knowledge of the cases and used that knowledge to unpack the factual similarities and differences between the structure and responsibilities of the Board of Patent Appeals, compared to prior cases drawing the line between principal and inferior officers. Her answer to the second Chevron question was similarly excellent. Where she lost points was on the third question. Having run out of time, she offered only the sketch of an argument. I am confident such timing issues on exams will not impact her performance as a law clerk. Emily has never requested an extension on her written submissions or struggled in any way to keep up with the demands of class—which, this year, included numerous short-turnaround assignments of various sorts.

Emily is liked by her peers who also recognize her various strengths as a writer and communicator. She was selected by her classmates to be the Executive Editor for the Drexel Law Review's 2021 symposium on reproductive rights and gender equality. The law review also selected her student note, Violence in the Name of the Confederacy: America's Failure to Defeat the Lost Cause, for publication.

A life-long Virginian, Emily was lured to Philadelphia with a three-year, full-tuition merit scholarship. She is eager to return home to work in family law. Please do not hesitate to call if you have any questions.

Sincerely,

Tabatha Abu El-Haj

Tabatha Abu El-Haj - taa53@drexel.edu

Professor of Law

Tabatha Abu El-Haj - taa53@drexel.edu

Emily R. Larrabee
1600 West Girard Avenue
Apartment 418
Philadelphia, Pennsylvania 19130

Writing Sample

The attached writing sample is a post-trial brief I drafted as a law clerk during my 2L year. The case involved an employment contract dispute that arose when an employer began making deductions from a previous employee's post-retirement commission payments five months after his retirement, and in contrast with previous statements by the company. We successfully argued that the parties' contracts and the company's statements compelled the company to repay our client the moneys that it deducted from the client's post-retirement commission payments.

Names included in this 10-page writing sample have been changed and case information has been redacted to preserve confidentiality. Additional arguments regarding attorney's fees have been omitted in this submission to reduce the sample's length.

IN THE CIRCUIT COURT FOR THE COUNTY OF [redacted]

JOHN SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.:** [redacted]
	)	
SALES ASSOCIATES, INC.,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S POST-TRIAL BRIEF

Plaintiff John Smith ("Smith"), by counsel and at the Court's instruction, submits the following Post-Trial Brief:

SUMMARY OF DISPUTE

Plaintiff seeks to recover post-retirement payments that have been withheld from him by his past employer, Sales Associates, Inc. A hearing was held in this case on [redacted], 2021 ("Hearing"). The remaining factual issue before the Court is whether or not Defendant is properly applying the Service Specialist Deduction to Plaintiff's post-retirement payments under the terms of the parties' 2005 Employment Agreement and the 2017 Addendum signed by the parties. (Transcript of the trial of [redacted], 2021 is hereafter referred to as "Tr.")

This case involves interpretation of an Agreement that was executed in 2005 and an Addendum to the Agreement that was executed in 2017. Defendant drafted both the Agreement and the Addendum. The relevant portion of the Agreement is Section 2, which is titled "Company's Responsibilities." (Ex. 1.) Subsection 2.2 of the Agreement dictated that Employee would be responsible for paying 49% of his assistant's salary, to be "deducted on an annual pro-rata basis from the Employee's commission due on the 15th of each month *for as long as the Employee is employed by the Company*." (Ex. 1 (emphasis added).) The Addendum neither replaced nor

modified Subsection 2.2 of the Agreement; Defendant explicitly mentioned relevant sections of the Agreement that were replaced or modified in the parties' 2017 Addendum. Roman Numerals I and II of the Addendum discussed the non-compete and non-solicitation provisions in the Agreement (Sections 5 and 6 of the Agreement). Roman Numeral III of the Addendum replaced Subsection 12.2 of the Agreement and subjected the Employee to the "same commission payment procedure" post-retirement. (Ex. 2.)

Plaintiff argues that this "same commission payment procedure" does not include taking the Service Specialist Deduction, which is limited by the language, "as long as the Employee is employed by the Company." Plaintiff further argues that Defendant's actions for the first five months of Plaintiff's retirement confirm its interpretation of "same commission payment procedure" because Defendant did not subtract the deduction from payments made during those months. After those five months, Defendant changed its course, and now argues that "same commission payment procedure" includes the deduction found in Subsection 2.2.

PROPOSED FINDINGS OF FACT

Plaintiff was first employed by Defendant in September of 1994. (Tr. 15:11.) He began as a salesperson with Defendant and eventually became a Vice-President in 2005. (Tr. 16:4-14.) Plaintiff and Defendant executed a new Employment Agreement on December 1, 2005 to account for this shift. (Tr. 16: 22-25; Ex. 1.) While employed, Plaintiff agreed to bear a portion of the salary of his Sales Assistants' salaries. (Tr. 21: 3-13; Ex. 1.)

Over the course of Plaintiff's employment, this Employment Agreement was amended a number of times by the parties. (Tr. 22-29; Ex. 37–45; Ex. 2.) The Addendums labeled as Exhibits 37–45 specifically identified which provisions of the Employment Agreement were being replaced with new language. Section III of Exhibit 2 specifically identified that it was

replacing Section 12.2 from the Employment Agreement. This Addendum did not state that it would replace any language from Section 2.2 of the Employment Agreement. This Addendum was signed on February 7, 2017. (Ex. 2.)

Mr. Bob was the sole drafter of the 2017 Addendum, and parts of the 2005 Employment Agreement. (Tr. 86: 2-19.)

In January of 2017, Plaintiff approached Sales Associates about clarifying how his post-retirement payments would be calculated. (Tr. 31: 6-16.) Plaintiff met with John Doe regarding some retirement questions he had, and Mr. Doe directed him to Jane Doe to have those answered. (Tr. 35: 3-12.) Plaintiff emailed those questions to Ms. Doe, and she responded back. One question was, "What deductions are taken out of my check?" Ms. Doe's response was, "None." (Tr. 36: 5-23; Ex. 6, 7.) Ms. Doe was the head of Human Resources for Sales Associates at the time. (Tr. 125: 1-5.) Ms. Doe admitted that she responded to these questions without reviewing the new Addendum. (Tr. 132: 1-23.)

Plaintiff retired from Sales Associates effective December 31, 2017. (Tr. 41: 25.) In February, March, and April of 2018, Plaintiff received his post-retirement payments with no Service Specialist Deduction subtracted from those payments. (Tr. 42: 5-25.)

Plaintiff was informed by letter in May of 2018 that Sales Associates would begin taking the Service Specialist Deduction out of his post-retirement payments. (Tr. 43: 6-19; Ex. 16.) Sales Associates began withholding $5,000 from Plaintiff's payments for the remainder of 2018. (Tr. 48: 23-25; Ex. 32, 34.) Sales Associates withheld roughly $3,000 every month from Plaintiff's post-retirement payments in 2019. (Tr. 49: 4-13; Ex. 32, 35.) During 2020, Sales Associates deducted $3,000 if the payments were large enough. When the payments were smaller than that, Sales Associates deducted the total amount due. (Tr. 49: 20-25; Ex. 32, 36.)